Docket for 04-563

(11)

No. 04-563
Title: Deneice A. Mayle, Warden, Petitioner
v.
Jacoby Lee Felix
Docketed: October 27, 2004
Lower Ct: United States Court of Appeals for the Ninth Circuit
Case Nos.: (02-16614)
Decision Date: August 9, 2004
Questions Presented

~~Date~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~
Oct 25 2004	Petition for a writ of certiorari filed. (Response due November 26, 2004)
Nov 24 2004	Brief of respondent Jacoby Lee Felix in opposition filed.
Nov 24 2004	Motion for leave to proceed in forma pauperis filed by respondent.
Dec 2 2004	Reply of petitioner Deneice A. Mayle, Warden filed.
Dec 8 2004	DISTRIBUTED for Conference of January 7, 2005.
Jan 7 2005	Motion for leave to proceed in forma pauperis filed by respondent GRANTED.
Jan 7 2005	Petition GRANTED.
Feb 15 2005	Joint appendix filed.
Feb 15 2005	Brief of petitioner Deneice A. Mayle, Warden filed.
Feb 22 2005	SET FOR ARGUMENT ON Tuesday, April 19, 2005.
Feb 22 2005	Brief amici curiae of Arizona, et al. filed.
Feb 22 2005	Brief amicus curiae of United States filed.
Feb 22 2005	Brief amicus curiae of Criminal Justice Legal Foundation filed.
Mar 2 2005	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Mar 4 2005	Record received from U.S.C.A. 9th Circuit. (1 envelope)
Mar 11 2005	CIRCULATED.
Mar 14 2005	Record received from U.S.D.C. for the Eastern District of California. (1 box)
Mar 22 2005	Brief amici curiae of Habeas Law Scholars Altschuler, et al. filed. (Distributed)
Mar 22 2005	Brief amici curiae of Professors Arthur R. Miller, et al. filed. (Distributed)
Mar 22 2005	Brief of respondent Jacoby Lee Felix filed. (Distributed)
Apr 4 2005	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Apr 4 2005	Reply of petitioner Deneice A. Mayle, Warden filed. (Distributed)
Apr 19 2005	Argued. For petitioner: Mathew K. M. Chan, Deputy Attorney General, Sacramento, Cal.; and Lisa S. Blatt, Assistant to the Solicitor General, Department of Justice, Washington, D.C. (for United States, as amicus curiae.) For respondent: David M. Porter, Assistant Federal Defender, Sacramento, Cal.

COPY

Supreme Court, U.S.
FILED
04-563 OCT 25 2004
OFFICE OF THE CLERK

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

DENEICE A. MAYLE, Warden, *Petitioner,*

v.

JACOBY LEE FELIX, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

BILL LOCKYER
Attorney General of the State of California
MANUEL M. MEDEIROS
State Solicitor General
ROBERT R. ANDERSON
Chief Assistant Attorney General
MARY JO GRAVES
Senior Assistant Attorney General
JANET E. NEELEY
Supervising Deputy Attorney General
BRIAN R. MEANS
Supervising Deputy Attorney General
MATHEW CHAN
Deputy Attorney General
Counsel of Record
1300 I Street
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 324-5232
Fax: (916) 324-2960
Counsel for Petitioner

QUESTION PRESENTED

When a habeas petitioner challenging a state judgment amends his petition to include a new claim, does the amendment relate back to the date of the filing of his petition and thus avoid the one-year statute of limitations, 28 U.S.C. § 2244(d)(1), so long as the new claim stems from the prisoner's trial, conviction, or sentence?

TABLE OF CONTENTS

	Page
PETITION FOR WRIT OF CERTIORARI	1
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	1
RELEVANT STATUTORY PROVISIONS	2
INTRODUCTION	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE PETITION	6
ARGUMENT	7
I. THE COURTS OF APPEAL ARE INTRACTABLY DIVIDED OVER THE QUESTION PRESENTED	7
II. THE CIRCUIT CONFLICT IS UNTENABLE GIVEN THE IMPORTANCE OF THE QUESTION PRESENTED	11
III. THE NINTH CIRCUIT'S DECISION IS WRONG ON THE MERITS	12
CONCLUSION	16

TABLE OF APPENDICES

Document	Appendix
Ninth Circuit Court of Appeal Opinion	A
District Court Order	B
District Court Findings & Recommendations (2/9/2001)	C
District Court Findings & Recommendations (5/14/2002)	D
California Court of Appeal, Third Appellate District decision	E
Cover page for petition for review; California Supreme Court order denying petition for review	F
Petition for Writ of Habeas Corpus (exhibits omitted)	G
District Court Docket Sheet	H
Amended Petition for Writ of Habeas Corpus (exhibits omitted)	I
Reporter's Transcript pages 519-522, 722, 753-755	J

TABLE OF AUTHORITIES

Cases	Page
Apprendi v. New Jersey, 530 U.S. 466 (2000)	8, 10
Clay v. United States, 537 U.S. 522 (2003)	9
Davenport v. United States, 217 F.3d 1341 (11th Cir. 2000)	7, 9
Duncan v. Walker, 533 U.S. 167 (2001)	11-13
Ellzey v. United States, 324 F.3d 521 (7th Cir. 2003)	4, 10
Fama v. Commissioner of Correctional Services, 235 F.3d 804 (2nd Cir. 2000)	9
Farris v. United States, 333 F.3d 1211 (11th Cir. 2003)	8
Felix v. Mayle, 379 F.3d 612 (9th Cir. 2004)	1
Mandacina v. United States, 328 F.3d 995 (8th Cir. 2003)	14
McKay v. Puckett, 255 F.3d 660 (8th Cir. 2001)	8

TABLE OF AUTHORITIES (continued)

	Page
Rhines v. Weber, 124 S.Ct. 2905 (2004)	10
United States v. Cicero, 214 F.3d 199 (D.C. Cir. 2000)	9
United States v. Craycraft, 167 F.3d 451 (8th Cir. 1999)	8, 9, 14
United States v. Duffus, 174 F.3d 333 (3rd Cir. 1999)	8, 9
United States v. Espinoza-Saenz, 235 F.3d 501 (10th Cir. 2000)	7, 9, 11
United States v. Hicks, 283 F.3d 380 (D.C. Cir. 2002)	7, 14
United States v. Patterson, 211 F.3d 927 (5th Cir. 2000)	9
United States v. Pittman, 209 F.3d 314 (4th Cir. 2000)	5, 8, 9, 11
Williams v. Taylor, 529 U.S. 420 (2000)	12
Wilson v. Fairchild Republic Co., 143 F.3d 733 (2d Cir. 1998)	14
Woodford v. Garceau, 538 U.S. 202 (2003)	12

TABLE OF AUTHORITIES (continued)

	Page
Woodward v. Williams, 263 F.3d 1135 (10th Cir. 2001)	7, 9
Statutes	
28 United States Code	
§ 2244	2
§ 2244(d)(1)	2, 3, 9, 12
§ 2244(d)(2)	12
§ 2254	3, 9, 10
§ 1254(1)	1
§ 2255	2, 8-10
Court Rules	
Rules Governing Section 2254	
Rule 11	13
Federal Rules of Civil Procedure	
15(a)	14, 15
15(c)	*Passim*
15(c)(2)	*Passim*
Other Authorities	
6A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure*, § 1497 (2d ed. 1990)	13
Advisory Committee Notes to Rule 11 of the Rules Governing Section 2254	13
Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA")	*Passim*

IN THE SUPREME COURT OF THE UNITED STATES

No.

DENEICE A. MAYLE, Warden, *Petitioner,*

v.

JACOBY LEE FELIX, *Respondent.*

PETITION FOR WRIT OF CERTIORARI

Petitioner Deneice A. Mayle respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Ninth Circuit (App. A) is reported as *Felix v. Mayle*, 379 F.3d 612 (9th Cir. 2004). The district court's order is unreported. (App. B.) The magistrate judge's findings and recommendations are unreported. (App. C and App. D.)

STATEMENT OF JURISDICTION

The opinion of the Ninth Circuit was filed on August 9, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Section 2244 of Title 28 of the United States Code provides in pertinent part:

> (d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. . . .
>
> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

INTRODUCTION

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") established a one-year limitations period for the filing of federal habeas corpus petitions challenging federal and state convictions and sentences. Pub. L. No. 104-132, Stat. 1214, 28 U.S.C. § 2244(d)(1), § 2255. At issue in this case is the application of that limitations period when a petitioner timely files his initial habeas petition, but then amends the petition after the limitations period has expired and adds a new and unrelated claim. Is the new claim time-barred or does it "relate back" to the original petition under Federal Rule of Civil Procedure 15(c)(2), which provides for the relation back of an amendment of a pleading when "the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading"?

In its decision below, the Ninth Circuit has joined the Seventh Circuit in holding that such a new claim "relates back" to the original petition so long as the new claim stems from the prisoner's trial, conviction or sentence—which is to say,

virtually always. Six circuits have reached the opposite conclusion. This petition asks the Court to resolve this deeply entrenched circuit split.

STATEMENT OF THE CASE

Following a jury trial in Sacramento, California, Jacoby Lee Felix was found guilty of first degree murder, with the "special circumstance" that the murder occurred during the course of the robbery, and second degree robbery. Felix was sentenced to life imprisonment without the possibility of parole.

On direct appeal, Felix argued in part that admission of the extrajudicial statements of Kenneth Williams violated Felix's constitutional right to confront witnesses. (App. E.) The state's intermediate court affirmed and the state supreme court subsequently denied review. (App. E, F.) Felix's state conviction became final on August 12, 1997. (App. C10.)

On May 8, 1998, Felix filed in federal court a timely in pro per petition for writ of habeas corpus under 28 U.S.C. § 2254, which contained fully exhausted claims. (App. G) On May 29, 1998, the district court appointed the Federal Defender to represent Felix. (App. C6.) Thereafter, on August 12, 1998, the one-year statute of limitations provided by the AEDPA expired. (App. C9-10, citing 28 U.S.C. § 2244(d)(1).) On September 15, 1998, the district court directed Felix to file an amended petition. (App. H3.)

On January 28, 1999, Felix filed an amended petition, which omitted all but one of the claims in the original habeas petition. (App. I.) In Claim Two of the amended petition, Felix repeated his Confrontation Clause claim based on the trial court's admission of statements from Kenneth Williams. In Claim One of the amended petition, Felix asserted for the first time that (1) the state court violated his right to due process and his right against self-incrimination by admitting into evidence his purportedly involuntary statements to the police and (2) he

was denied effective assistance of counsel because his appellate attorney had failed to raise that claim.

Felix thereafter exhausted Claim One in state court while a motion to dismiss his "mixed" petition was pending in the federal district court. An answer to the fully exhausted amended petition was subsequently filed. (App. C7.)

The magistrate judge issued findings and recommendations which concluded that the arguments raised in Claim One were barred by AEDPA's statute of limitations. The magistrate judge rejected Claim Two on its merits. (App. C.) The magistrate judge later issued additional findings and recommendations which explained that Felix's new coerced-confession claim did not "relate back" to the timely-filed petition under Federal Rule of Civil Procedure 15(c)(2) because the claim did not arise "out of the conduct, transaction, or occurrence set forth . . . in the original pleading." (App. D5-9.) The magistrate observed that the coerced confession claim and the Confrontation Clause claim did not arise from the "same core of facts."[1/] (App. D8-9.) The district court adopted the findings and recommendations in full. (App. B.)

The Ninth Circuit Court of Appeals, in a 2-1 decision, reversed the district court's ruling that Claim One was time-barred. In applying Rule 15(c)(2) to find that Claim One related back to the originally-filed petition, the Ninth Circuit sided with *Ellzey v. United States*, 324 F.3d 521 (7th Cir. 2003), and announced that "a prisoner's new claim arises out of the same transaction or occurrence as his original petition because the transaction or occurrence in issue is his state trial and conviction." (App. A4.) The court stated that "[w]e accordingly disagree, respectfully, with the decisions of several circuits that

---

1. The coerced confession claim was based on statements that Felix made to the police in October 1993, following his arrest (App. J [RT 722]); the Confrontation Clause claim was based on statements that Kenneth Williams made more than three months later. (App. J [RT 519-522, 753-755].)

deny relation back under Rule 15(c)(2) when a new claim rests on a theory or facts within a trial not raised in the original habeas petition." (App. A8.)

Responding to the other circuits' concern that its interpretation "would erode the effectiveness of AEDPA's one-year statute of limitations," the Ninth Circuit stated that the petitioner still must file his original petition within the limitations period. (App. A8.) The court also rejected the contention that its rule violates the policy of Rule 15(c) that the non-moving party have fair notice of the claims added by amendment. The court reasoned that as long as the "initial petition brought [the] trial and conviction to the attention of the State, . . . it could anticipate amendments challenging allegedly unconstitutional rulings at that trial." (App. A10.)

Judge Tallman dissented. He observed that "[b]y defining 'conduct, transaction, or occurrence' so broadly that any claim stemming from pre-trial motions, the trial, or sentencing relates back to a timely-filed habeas petition, the court obliterates AEDPA's one year statute of limitation." (App. A13.)[2/]

Judge Tallman agreed with the Fourth Circuit that the majority's approach "views 'occurrence' at too high a level of generality. . . . If we were to craft such a rule, it would mean that amendments . . . would almost invariably be allowed even after the statute of limitations has expired, because most [habeas] claims arise from a criminal defendant's underlying conviction and sentence." (App. A15, quoting *United States v. Pittman*, 209 F.3d 314, 318 (4th Cir. 2000)). The dissent also found that the majority's rule undermines the fair-notice policy underlying Rule 15(c), because the claim asserted in the original petition did not in any way provide notice of the entirely distinct claim raised in the amended petition. (App. A16-17.)

---

2. While the majority opinion refers to the "conduct, transaction, or occurrence" as being the "state trial and conviction" (App. A4, 12-13), it does not dispute the dissent's charge that the holding also permits relation back of any claims arising out of pre-trial motions or sentencing.

REASONS FOR GRANTING THE PETITION

There is an acknowledged conflict over whether a new claim in an amendment filed after expiration of AEDPA's statute of limitations relates back to a timely-filed challenge to the judgment so long as the new claim arises from the prisoner's trial, conviction or sentence. This split, if not resolved, allows for disparate treatment of habeas proceedings among the circuits that have weighed in on the issue and creates uncertainty in those few circuits that have not. Certiorari is warranted to resolve this conflict.

There is no reason to delay resolution of the issue and await further dissension in the lower courts. Eight circuits have already ruled on the question presented, and the issue is an important and recurring one that concerns the core objective of the AEDPA, reducing delay and promoting finality in criminal proceedings.

In addition, the Ninth Circuit's decision is wrong on the merits. It frustrates the intent behind the AEDPA limitations period by allowing for the addition of new, unrelated and unexhausted claims after expiration of the statute of limitations. And the Ninth Circuit's decision is incompatible with the purpose or policy of Rule 15(c). The Ninth Circuit rule does not provide the non-moving party with adequate notice of new claims and effectively removes the district court's discretion in applying Rule 15(c) in habeas challenges to state convictions and sentences.[3]

---

3. Prior to the AEDPA, there was no statute of limitations for habeas filings. While numerous circuit courts have determined that Rule 15(c) applies to habeas proceedings, this Court has not ruled on the matter. We assume for purposes of argument that Rule 15(c) applies.

ARGUMENT

I.

THE COURTS OF APPEAL ARE INTRACTABLY DIVIDED OVER THE QUESTION PRESENTED

As the Ninth Circuit acknowledged, its interpretation of "conduct, transaction, or occurrence" to relate back any claim stemming from the trial, conviction or sentence in a habeas proceeding is in conflict with the rulings of a majority of other circuits. (App. A8.) Six circuits—the Third, Fourth, Eighth, Tenth, Eleventh, and District of Columbia—have held that for an untimely claim to "relate back" under Rule 15(c) the untimely claim must have more in common with the timely-filed claim than the mere fact that they arose from the same trial and sentencing proceeding:

- *United States v. Hicks*, 283 F.3d 380, 389 (D.C. Cir. 2002) (new claim that government failed to prove the quantity of drugs at trial did not relate back to timely claim regarding government's willingness to grant leniency in exchange for testimony);

- *United States v. Espinoza-Saenz*, 235 F.3d 501, 505 (10th Cir. 2000) ("completely new claims of ineffective assistance of counsel" did not relate back to timely-filed claims asserting sentencing errors by court); *see also Woodward v. Williams*, 263 F.3d 1135, 1142 (10th Cir. 2001) (new claims of ineffective counsel and juror misconduct did not relate back to initial petition alleging evidentiary error);

- *Davenport v. United States*, 217 F.3d 1341, 1346 (11th Cir. 2000) (three new claims of ineffective assistance of counsel did not arise out of the same set of facts as the original claims of ineffectiveness, but arose from separate conduct and

occurrences); *see also Farris v. United States*, 333 F.3d 1211, 1215 (11th Cir. 2003) (challenge to prior conviction and claims based on *Apprendi v. New Jersey*, 530 U.S. 466 (2000) did not relate back to pleading alleging ineffective counsel for failure to advise regarding sentencing exposure and claim regarding interpretation of sentencing guidelines);

- *United States v. Pittman*, 209 F.3d 314, 317-18 (4th Cir. 2000) (claim of ineffective assistance of counsel for failure to file a requested appeal and claim regarding an obstruction of justice enhancement did not relate back to claims that the district court lacked jurisdiction to impose enhanced sentence for prior convictions, improper enhancement for prior convictions, and government's failure to establish that the drugs at issue were crack cocaine);

- *United States v. Duffus*, 174 F.3d 333, 335-38 (3d Cir. 1999) (district court correctly denied relation back for a new claim of ineffective assistance of counsel based on counsel's failure to move to suppress evidence where timely-filed ineffectiveness claims were based on counsel's asserted failure to argue insufficient evidence on appeal and counsel's failure to object at sentencing); and

- *United States v. Craycraft*, 167 F.3d 451, 457 (8th Cir. 1999) (new claim of ineffective assistance of counsel based on counsel's failure to file an appeal did not relate back to timely-filed ineffectiveness claims based on other grounds); *see also McKay v. Puckett*, 255 F.3d 660 (8th Cir. 2001) (per curiam) (affirming dismissal of belated ineffective assistance claims based on counsel's conduct prior to conviction and sentence because they did not relate back to the original claim of state court error).[4/]

---

4. Most of these cases involved challenges to a federal conviction or sentence under 28 U.S.C. § 2255. As the decision below correctly

The reasoning of those courts is exemplified by the decision in *United States v. Pittman*, 209 F.3d at 317-18, where the court stated:

> The fact that amended claims arise from the same trial and sentencing proceeding as the original motion does not mean that the amended claims relate back for purposes of Rule 15(c). If we were to craft such a rule, it would mean that amendments to a § 2255 motion would almost invariably be allowed even after the statute of limitations had expired, because most § 2255 claims arise from a criminal defendant's underlying conviction and sentence. Such a broad view of "relation back" would undermine the limitations period set by Congress in the AEDPA.

See also Davenport, 217 F.3d at 1344 (observing that *Pittman*, *Duffus*, and *Craycraft* all held that for an untimely claim to "relate back" under Rule 15(c) the untimely claim must have more in common with the timely-filed claim than the mere fact that they arose out of the same trial and sentencing proceeding).

---

observed, "their reasoning applies equally to cases like Felix's that challenge state convictions under 28 U.S.C. § 2254." (App. A4 n.1; *accord*, *Woodward v. Williams*, 263 F.3d at 1142 (in applying *Espinoza-Saenz* to a state prisoner petition under 28 U.S.C. § 2254, court stated, "we see no reason to treat the issue differently.") There is no difference relevant to the question presented between the statute of limitations set forth in § 2255 ¶6 and that set forth in § 2244(d)(1). Both impose a "1-year period of limitation" to habeas applications running from the date the judgment under review became final or from three other specified dates. *See Clay v. United States*, 537 U.S. 522, 528 (2003); *United States v. Patterson*, 211 F.3d 927, 930 (5th Cir. 2000) ("the limitations provisions for § 2254 and § 2255 are 'nearly identical'"). Other courts of appeal have therefore also quite properly held that decisions involving one fully apply to the other. *See Fama v. Commissioner of Correctional Services*, 235 F.3d 804, 815-16 (2nd Cir. 2000); *United States v. Cicero*, 214 F.3d 199, 203, n* (D.C. Cir. 2000) ("Courts have generally applied the same analysis to the time limitations in § 2254 and § 2255").

By contrast, the Seventh and Ninth Circuits have held that a new claim "relates back" to the original petition so long as the new claim stems from the prisoner's trial, conviction or sentence. (*See* App. A4, A7, citing *Ellzey*, 324 F.3d at 521.) In *Ellzey*, the Seventh Circuit addressed whether added arguments based on *Apprendi v. New Jersey*, 530 U.S. 466, related back to a timely-filed § 2255 motion that included a claim that counsel's performance with respect to sentencing was subpar. *Ellzey*, 324 F.3d at 525. The court concluded that the added arguments related back, stating that "[a] prisoner who comes up with ten different ways to contest his sentence still is litigating about a single transaction or occurrence (the supposedly unlawful sentence), so an amendment necessarily relates back under Rule 15(c)(2)." *Id.* at 525-26. *Ellzey* added that "our opinion leaves in its wake a conflict among the circuits about the application of Rule 15(c)(2) to collateral attacks." *Id.* at 527.[5]

5. *Rhines v. Weber* (No. 03-9046), which is pending before this Court (124 S.Ct. 2905 (2004)), addresses the question of whether a federal district court may stay a 28 U.S.C. § 2254 petition for habeas corpus that includes exhausted and unexhausted claims when the stay is necessary to permit the prisoner to exhaust claims in state court without having his federal petition barred by AEDPA's one-year statute of limitations. Resolution of that issue does not resolve the question presented in this case and would not settle the above-noted conflict among the circuits, none of which involved the initial filing of a mixed petition.

II.

THE CIRCUIT CONFLICT IS UNTENABLE GIVEN THE IMPORTANCE OF THE QUESTION PRESENTED

The proper interpretation of the phrase "conduct, transaction or occurrence" in Rule 15(c)(2) in the habeas corpus context is vital to the effectiveness of AEDPA's statute of limitations. As the Tenth Circuit observed in *Espinoza-Saenz*, "because a majority of amendments to § 2255 motions raise issues which relate to a defendant's trial and sentencing, to allow amendment under the broad umbrella would be tantamount to judicial rescission of AEDPA's statute of limitations period." 235 F.3d at 505; *see also Pittman*, 209 F.3d at 318 (relating back claims arising from the same trial and sentencing proceeding would mean that amendments "would almost invariably be allowed even after the statute of limitations had expired").

Under the Ninth Circuit's holding, a habeas corpus petitioner who files a timely challenge to his conviction or sentence can bring future claims to challenge the conviction or sentence without ever having to worry that such future claims will be barred under the statute of limitations. This creates an incentive for prisoners to file a minimal "placeholder" petition within the statute of limitations period, thereby providing them an endless period of time in which to add new, unrelated habeas claims. The delay that can result from the Ninth Circuit's ruling, especially in capital cases, is in direct conflict with the goals of the AEDPA.

This issue is a recurring one because it is often the case that the AEDPA limitations period expires during the course of a habeas proceeding. *See Duncan v. Walker*, 533 U.S. 167, 186 (2001) (Breyer, J., dissenting). The question presented in this petition is relevant in all such cases.

III.

THE NINTH CIRCUIT'S DECISION IS WRONG ON THE MERITS

The AEDPA was designed to prevent federal habeas petitioners from unduly delaying the finality of their court judgments. *Woodford v. Garceau*, 538 U.S. 202, 206 (2003) ("Congress enacted AEDPA to reduce delays in the execution of state and federal criminal sentences, particularly in capital cases, . . . and 'to further the principles of comity, finality, and federalism' . . . .") (quoting *Williams v. Taylor*, 529 U.S. 420, 436 (2000)). As noted in *Duncan v. Walker*, AEDPA's one-year statute of limitations under § 2244(d)(1) "reduces the potential for delay on the road to finality," and the tolling provision of § 2244(d)(2) "provides a powerful incentive for litigants to exhaust all available state remedies before proceeding in the lower federal court." 533 U.S. at 179-80.

The Ninth Circuit applies Rule 15(c)(2) to relate back any claim that arises out of a prisoner's trial, conviction or sentence. Such an application of the rule provides an automatic bypass to the time bar for federal habeas challenges to a conviction or sentence and subverts AEDPA's one-year limitations period. The Ninth Circuit points out that the AEDPA still requires the filing of a petition within a one-year statute of limitations period. (App. A8.) That requirement, however, would no longer serve the purposes of the AEDPA (i.e., to reduce delay and to promote finality) if federal habeas proceedings could then be stalled by the addition of new—and possibly unexhausted—claims after expiration of the statute of limitations.

In the instant case, Felix filed a timely petition containing fully exhausted claims. He then filed an amendment after the statute of limitations period had expired, which contained a new, unrelated and unexhausted claim. That action delayed the federal habeas proceedings until Felix exhausted his new claim in state court. Allowing such a practice nullifies the "powerful

incentive for litigants to exhaust all available state remedies *before* proceeding in the lower federal courts." *Duncan v. Walker*, 533 U.S. at 180 (emphasis added). It also undermines the interest in finality "by creating *more potential* for delay in the adjudication of federal law claims." *Id.* (emphasis added.)

Rule 11 of the Rules Governing Section 2254 provides that the Federal Rules of Civil Procedure apply to the extent they are not inconsistent with the habeas rules. And the Advisory Committee Notes to Rule 11 of the rules governing section 2254 point out that the courts need not "rigidly apply rules [of civil procedure] which would be inconsistent or inequitable in the overall framework of habeas corpus." The Ninth Circuit's application of the phrase "conduct, transaction, or occurrence" to the habeas context runs afoul of that admonition by undermining the AEDPA limitations period.

The Ninth Circuit decision is also contrary to the structure and objectives of Rule 15(c) itself. To be sure, "the rationale of the relation back rule is to ameliorate the effect of the statute of limitations." 6A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure*, § 1497 (2d ed. 1990). The rule does so, however, not by shielding *all* new claims from the limitations periods, but by shielding only that narrow set of new claims arising "out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading." In demarcating that narrow set, the key inquiry is "whether the opposing party has been put on notice regarding the claim or defense raised by the amended pleading. . . . A failure of notice will prevent relation back." *Id.* The Ninth Circuit's construction of Rule 15(c), however, authorizes the relation back of new claims in habeas cases even where the state had no reason to anticipate that such claims would eventually be asserted.

Because of the great variety of ways in which a habeas petitioner could challenge his state conviction or sentence, the filing of an initial habeas corpus petition to challenge a state conviction or sentence on one ground does not put the opposing

party on fair notice of all the possible claims that could be brought in the future. For example, it can hardly be said that a petition containing a single claim of instructional error gives notice of a future claim asserting that the prosecution improperly exercised a peremptory challenge against a specific juror. Thus, it is no wonder that the lack of notice has been the basis for other circuits' rejection of the broad Ninth Circuit interpretation of the "conduct, transaction, or occurrence" language of Rule 15(c)(2) in habeas proceedings. *See, e.g.*, *Hicks*, 283 F.3d at 389; *Craycraft*, 167 F.3d at 457.

The absence of fair notice under the Ninth Circuit rule is particularly acute when the new claim has not been exhausted in the state courts. These are claims that the petitioner not only failed to assert in his original federal habeas petition, but failed to assert on direct appeal and possibly one or more rounds of post-conviction review in state courts. Where, as in this case, the newly-asserted unexhausted claim is based on different facts and legal theories than those underlying the original claim, it requires a suspension of disbelief to conclude that the state had fair notice of the newly-asserted claim.

The determination of whether an amended claim relates back to an original filing under Rule 15(c) ultimately depends on the adequacy of notice and rests with the discretion of the district court. *Wilson v. Fairchild Republic Co.*, 143 F.3d 733, 738 (2d Cir. 1998); *see Mandacina v. United States*, 328 F.3d 995, 1000-01 (8th Cir. 2003). However, the rule announced by the Ninth Circuit effectively strips the lower court of its exercise of discretion in all habeas challenges to the state conviction or sentence. Under the Ninth Circuit's decision, the district court would be required to find that new claims that arise from the same trial, conviction or sentence relate back to the original petition without any consideration of whether the opposing party was put on fair notice of those claims.

Contrary to the Ninth Circuit's suggestion (App. A9), these problems are not solved by Federal Rule of Civil Procedure 15(a), which provides that a district court may deny a petitioner

leave to amend following the filing of a responsive pleading. First, a petitioner is free to amend his petition up until the time that a responsive pleading is filed. Fed. R. Civ. P. 15(a). In cases in which the district court appoints counsel, as was the case here, counsel will invariably be allowed to file an amended petition before a responsive pleading is filed. Second, and more fundamentally, the Ninth Circuit still permits district courts to grant leave to amend even when the state had not been provided with fair notice of the new claims.

At bottom, the Ninth Circuit rule would provide all prisoners challenging their conviction or sentences in federal habeas proceedings an advantage over all other civil litigants, for only habeas petitioners would receive the benefits of relation back for virtually *any* newly-asserted claim. The Ninth Circuit provides no justification for affording prisoners, who are seeking the extraordinary remedy of federal habeas relief, such preferential treatment, and none emerges from close inspection of Rule 15(c).

For these reasons, the majority of circuits that have decided the question presented have reached the correct result; the Ninth Circuit did not, and should be reversed.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: October 25, 2004

Respectfully submitted,

BILL LOCKYER
Attorney General of the State of California

MANUEL M. MEDEIROS
State Solicitor General

ROBERT R. ANDERSON
Chief Assistant Attorney General

MARY JO GRAVES
Senior Assistant Attorney General

JANET E. NEELEY
Supervising Deputy Attorney General

BRIAN R. MEANS
Supervising Deputy Attorney General



MATHEW CHAN
Deputy Attorney General
Counsel of Record

Counsel for Petitioner

MKC:bam
SA2003FA0014

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JACOBY LEE FELIX, *Petitioner-Appellant,* v. **DENEICE A. MAYLE, Warden,** *Respondent-Appellee.*	No. 02-16614 D.C. No. CV-98-00828-WBS OPINION

Appeal from the United States District Court
for the Eastern District of California
William B. Shubb, District Justice Presiding

Argued and Submitted
November 4, 2003 -- San Francisco, California
Submission Withdrawn April 13, 2004
Resubmitted July 8, 2001

Filed August 9, 2004

Before: William C. Canby. Jr., William A. Fletcher, and
Richard C. Tallman, Circuit Judges

Opinion hy Judge Canby;
Partial Concurrence and Partial Dissent by Judge Tallman

SUMMARY

Criminal Law and Procedure/Habeas Corpus

The court of appeals affirmed a judgment of the district

court in part, reversed in part, and remanded. The court held that when a habeas petitioner challenging a state conviction amends his federal petition to include a new claim, the amendment relates back to the date of filing of his petition under Federal Rule of Civil Procedure 15(c)(2), because the new claim arises out of the same transaction or occurrence as his original petition as the transaction or occurrence in issue in his state trial and conviction.

Appellant Jacoby Felix was convicted for first degree murder and second degree robbery in California state court. On appeal to the California Court of Appeal, he argued that the admission into evidence of videotaped statements of a key prosecution witness violated his Sixth Amendment right to confront the witness against him. The Court of Appeal affirmed the judgment. The California Supreme Court subsequently denied Felix's Petition for Review. Felix then filed a federal habeas corpus petition, raising the same arguments that were raised in his state appeal. Subsequent to the expiration of the Antiterrorism and Effective Death Penalty Act's (AEDPA's) one-year statute of limitations for habeas relief, Felix filed an amended petition that included the Confrontation Clause claim asserted in the original petition and an additional claim, which alleged that the state court violated his right to due process and his Fifth Amendment right against self-incrimination by admitting into evidence allegedly involuntary statement that Felix had made during a police interview. The district court accepted the recommended finding of the magistrate judge that the coerced confession claim did not relate back under Rule 15(c)(2) because it did not arise from the "same core of facts" as the Confrontation Clause claim, and was thus time-barred under AEDPA. IN addition, the district court dismissed Felix's Confrontation Clause claim on the merits.

Felix appealed.

[1] Rule 15(c) applies to federal habeas corpus cases, and provides, in part, that an amendment of a pleading relates back to the date of the original pleading when the claim or defense in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading. [2] The Ninth Circuit joined with the Seventh Circuit in determining that the proper "conduct, transaction, or occurrence" in a habeas context is the trial and conviction under attack. [3] The language of Rule 15(c)(2) supported this conclusion. [4] Thus, it had to be held that the district court erred in ruling that Felix's coerced confession claim did not relate back to his initial petition under Rule 15(c)(2), and its judgment on this point had to be reversed and remanded.

[5] With regard to Felix's claim that the district court erred in dismissing his Confrontation Clause claim on the merits, the court of appeals determined that the state court's ruling on this claim was not contrary to, nor an unreasonable application of, clearly established federal law, nor did it involve an unreasonable determination of the facts. Thus, the district court's dismissal of this claim had to be affirmed.

Judge Tallman concurred in part and dissented in part, writing that by defining "conduct, transaction, or occurrence" as broadly as the majority had, so that any claim stemming from pre-trial motion, the trial, or sentencing relates back to a timely-filed habeas petition. AEDPA's one-year statute of limitation would be obliterated.

COUNSEL

David M. Porter, Assistant Federal defender, Sacramento, California, for the petitioner-appellant.

Mathew Chan, Deputy Attorney General, Sacramento, California, for the respondent-appellee.

OPINION

CANBY, Circuit Judge:

This case, in which state prisoner Jacoby Lee Felix seeks a federal writ of habeas corpus to overturn his state conviction, presents an important question of federal civil procedure that has divided other circuits. The question is this: when a habeas petitioner challenging a state conviction amends his federal petition to include a new claim, does the amendment relate back to the date of filing of his petition and thus avoid the one-year limitation of the Antiterrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. § 2244(d)(1)? That question in turn depends upon the interpretation of Federal Rule of Civil Procedure 15(c)(2), which provides that an amendment relates back to the date of the original pleading when "the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth . . . in the original pleading." We join the Seventh Circuit in concluding that a prisoner's new claim arises out of the same transaction or occurrence as his original petition because the transaction or occurrence in issue is his state trial and conviction. *See Ellzey v. United States*, 324 F.3d 521 (7th Cir. 2003).[1] The claim thus relates back under Rule 15(c)(2). We accordingly reverse the ruling of the district court holding Felix's claim of coerced confession to be time-barred.

---

1. *Ellzey* and cases to be discussed later from other circuits that conflict with *Ellzey* arose in the context of challenges to federal convictions or sentences under 28 U.S.C. § 2255, but their reasoning applies equally to cases like Felix's that challenge state convictions under 28 U.S.C. § 2254.

Felix also argues that the district court erred in dismissing his Confrontation Clause claim on the merits. We find no error, and we accordingly affirm the district court's dismissal of the Confrontation Clause claim.

FACTUAL BACKGROUND

In 1995, Felix was convicted of first degree murder and second degree robbery in California state court. On appeal to the California Court of Appeal, he argued that the admission into evidence of videotaped statements of a key prosecution witness violated his Sixth Amendment right to confront the witnesses against him. The Court of Appeal affirmed the judgment. The California Supreme Court subsequently denied Felix's Petition for Review and his state conviction became final on August 12, 1997.

On May 8, 1998, Felix filed in federal district court a *pro se* petition for writ of habeas corpus raising the same arguments that were raised in his state appeal. AEDPA's one-year statute of limitations for habeas relief expired on August 11, 1998. On January 28, 1999, Felix filed, through counsel, an amended petition that included the Confrontation Clause claim asserted in the original petition and an additional claim, which alleged that the state court violated his right to due process and his Fifth Amendment right against self-incrimination by admitting into evidence allegedly involuntary statements that Felix had made during a police interview. The district court accepted the recommended finding of the magistrate judge that the coerced confession claim did not relate back under Rule 15(c)(2) because it did not arise from the "same core of facts" as the Confrontation Clause claim. The court accordingly held the coerced confession claim to be time-barred by AEDPA's one-year limitation.

Felix filed a timely notice of appeal and the district court issued a certificate of appealability for the coerced confession and Confrontation Clause claims. We have jurisdiction under 28 U.S.C. § 2253 and we review the district court's decision *de novo*. *See Clark v. Murphy*, 331 F.3d 1062, 1067 (9th Cir. 2003).

DISCUSSION

A

[1] Rule 15(c) applies to federal habeas corpus cases. *See Anthony v. Cambra*, 236 F.3d 568, 576 (9th Cir. 2000). That Rule provides, among other things:

> [a]n amendment of a pleading relates back to the date of the original pleading when . . . the claim or defense in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading.

Fed. R. Civ. P. 15(c)(2). In other civil litigation, we have required relation-back of new claims arising from the same "conduct, transaction, or occurrence" as the claim in the original complaint, even when the new claims are based on a different legal theory of which there was no warning in the original pleading. *See Kern Oil & Ref. Co. v. Tenneco Oil Co.*, 840 F.2d 730, 736 (9th Cir. 1988). We fail to see why this literal application of Rule 15(c) should not apply to habeas corpus proceedings.

[2] The Confrontation Clause claim asserted by Felix in his original federal petition arose from the trial that ended with his conviction in state court. His coerced confession claim

arises from the same transaction—his trial and conviction in state court. Both claims assert that the conviction was tainted by unconstitutional evidence introduced at his trial. The fact that the claims differ does not mean that they arise from different occurrences. I t unduly strains the usual meaning of "conduct, transaction, or occurrence" to regard a criminal trial and conviction as a series of perhaps hundreds of individual occurrences. The Seventh Circuit explained that in such an approach:

> [e]ach step of the trial, and each legal argument, becomes a separate transaction or occurrence. Yet this is not how the phrase "conduct, transaction, or occurrence" is used in civil practice. That phrase sums up the "same transaction" approach to the law of preclusion (and thus to compulsory joinder): all legal issues and claims for relief arising out of a single transaction may (and often must) be raised together, and Rule 15(c) specifies that anything that would be barred, if not brought now, may be added and litigated.

Ellzey, 324 F.3d at 526. We agree with *Ellzey* that the proper "conduct, transaction, or occurrence" in a habeas context is the trial and conviction under attack.

[3] The language of Rule 15(c)(2) supports our conclusion. It provides for the relation back of a "claim" added by amendment if the new claim arises from the same conduct, transaction or occurrence set forth in the original pleading. A new "claim" will nearly always rest on a legal theory, and often on a subset of facts within the larger transaction or occurrence, that differs from those underlying the claim asserted by the original pleading. That is the reason that an amendment becomes necessary. But if such differences are sufficient to prevent relation back under Rule 15(c)(2), that provision of the Rule will be rendered virtually meaningless

in the habeas context.

We accordingly disagree, respectfully, with the decisions of several circuits that deny relation back under Rule 15(c)(2) when a new claim rests on a theory or facts within a trial not raised in the original habeas petition. *See United States v. Hicks*, 283 F.3d 380, 388 (D.C. Cir. 2002); *Davenport v. United States*, 217 F.3d 1341, 1344-45 (11th Cir. 2000); *United States v. Pittman*, 209 F.3d 314, 317-18 (4th Cir. 2000); *United States v. Duffus*, 174 F.3d 333, 337-38 (3rd Cir. 1999); *United States v. Craycraft*, 167 F.3d 451, 457 (8th Cir. 1999). We distinguished these cases in *Anthony*, 236 F.3d at 577, but neither endorsed nor rejected their rule because we found it unnecessary to "determine here the full scope of [Rule 15(c)(2)'s] application to amendments of habeas petitions." *Id.* at 576. Today we cannot distinguish these cases, and so we reject their rule in favor of that of *Ellzey*.

One of the concerns expressed in some of these cases and in the dissent here is that interpreting "conduct, transaction, or occurrence" in the usual, less restrictive manner would erode the effectiveness of AEDPA's one-year statute of limitations. *See, e.g., Hicks*, 283 F.3d at 388. AEDPA, however, still requires the original petition to be filed within the one-year period (with exceptions not relevant here). Giving effect to Rule 15(c)(2) does not, therefore, nullify AEDPA's one-year period.[2] On the other hand, precluding relation back of new

---

2. In asserting that our decision "obliterates AEDPA's one year statute of limitation," Judge Tallman's dissent undervalues the strict requirement that the original federal habeas petition be filed within that time. The dissent also fails to take account of the very considerable incentive for a state prisoner to file all of his or her claims in the original petition or by amendment as soon thereafter as possible. If the prisoner delays, final judgment may be entered on the unamended petition, and the prisoner will almost certainly be unable to meet the strict requirements for a second

claims effectively nullifies Rule 15(c)(2) in habeas proceedings. We decline to read Rule 15(c)(2) in a way that contravenes the ordinary meaning of its language and renders it meaningless in the habeas context. As the Seventh Circuit pointed out, abuses of Rule 15 can be controlled by the district court under subsection (a), which requires leave of court to file an amendment after a responsive pleading has been filed.[3] *See* Fed. R. Civ. P. 15(a); *Ellzey*, 324 F.3d at 527.

The State argues here that, even if the usual definition is given to the term, Felix's two claims do not arise from the same "conduct, transaction, or occurrence" within the meaning of Rule 15(c)(2). The State argues that the coerced confession claim arises out of an interrogation of Felix conducted by police on October 28, 1993, while the Confrontation Clause claim is based on statements voluntarily made by a witness more than three months later. This argument, however, ignores the nature of Felix's habeas challenge. Felix is not bringing a civil action to recover damages for the alleged coercion exerted by police at the time they secured his confession, and he certainly asserts no claim based on the voluntary statement made by another person at another time. He is challenging the usual subject of a habeas petition—the custody that results from his conviction and trial. His coerced confession claim and Confrontation Clause claim assert that the Constitution was violated by the introduction of his confession and the witness's statement *at his trial*. Except for the use of these statements at his trial, Felix can state no habeas claim. We therefore reject the State's contention that we should look beyond the events of

---

petition to address the additional claim. *See* 28 U.S.C. § 2244(b)(2).

3. In general, however, "leave shall be freely given when justice so requires." Fed. R. Civ. P. 15(a).

the trial to find the "conduct, transaction, or occurrence" that is the subject of Felix's claims.

We also reject the State's contention that permitting Felix's claims to relate back will frustrate the purpose of Rule 15(c)(2) to give notice to the non-moving party that such an amendment might be contemplated. It is true that, in *Anthony*, 236 F.3d at 576-77, we held that the State clearly had notice of claims sought to be added by amendment. But that was only one way of rejecting the State's argument in *Anthony* that notice beyond identity of "conduct, transaction, or occurrence" was required. We long ago rejected the argument that relation back under Rule 15(c)(2) required a "fair warning" of the amendment beyond the warning inherent in, and required by, the language of the rule. *Kern Oil*, 840 F.2d at 736. "Under Rule 15, the only question is whether the later claims arise out of the conduct, transaction, or occurrence brought to the defendant's attention by the initial claim." *Id.* Here, Felix's initial petition brought his trial and conviction to the attention of the State, and it could anticipate amendments challenging allegedly unconstitutional rulings at that trial. Rule 15(c)(2) as interpreted in *Kern Oil* requires no more.[4]

[4] We conclude, therefore, that the district court erred in ruling that Felix's coerced confession claim did not relate back to his initial petition under Rule 15(c)(2). We accordingly
reverse the district court on this point and remand for further

4. Our decision in *Ford v. Hubbard*, 330 F.3d 1086 (9th Cir. 2002), has no bearing on our ruling here because it was vacated and reversed in *Pliler v. Ford*, 2004 WL 1373174 (U.S. June 21, 2004). It therefore has no precedential effect. *See Roe v. Anderson*, 134 F.3d 1400, 1404 (9th Cir. 1998). The Supreme Court in *Pliler* declined to reach any issues of relation back under Rule 15.

proceedings with respect to that claim.[5]

B

[5] The remaining issue raised by Felix concerns his Confrontation Clause claim. He contends that the state court violated his right to confront witnesses by admitting into evidence portions of a videotaped interview given by a key prosecutorial witness, even though the witness denied any memory of the interview at trial. The circumstances indicated strongly that the witness's loss of memory was feigned. Felix argues that his right to cross-examine was effectively nullified.

Felix is entitled to relief from his state court conviction only if the state court's ruling "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or . . . was based on an unreasonable determination of the facts." 28 U.S.C. § 2254(d); *Lockyer v. Andrade*, 538 U.S. 63 (2003) (explaining AEDPA's standard). We conclude that Felix fails to meet that standard. The Supreme Court has held that the Confrontation Clause of the Sixth Amendment is not violated by the admission of a prior identification by a witness who is unable, because of memory loss, to testify concerning the basis for the identification. *United States v. Owens*, 484 U.S. 554, 564 (1988). Although *Owens* did not address the question of a witness who *feigned* memory loss, no other Supreme Court decision has addressed that point either. The

5. Our disposition of this issue renders it unnecessary for us to address in detail Felix's contention that the State waived its defense based on AEDPA's one-year limitation. Suffice it to say that, in urging the district court to rule on both the limitation and the merits, the State did not waive its limitation defense.

state court's decision that the admission of a videotaped statement of a witness who is unable, because of *feigned* memory loss, to testify concerning the basis for the statement is not contrary to nor an unreasonable application of *Owens*, nor of any other Supreme Court case.

Felix argues that the state court's ruling was contrary to *Douglas v. Alabama*, 380 U.S. 415, 419 (1965), in which the Supreme Court held that admission of a prior statement by a witness who, at trial, claimed a Fifth Amendment right not to respond, violated the Sixth Amendment. *Douglas* is distinguishable, however, because there was no way to cross-examine the witness who had invoked the Fifth Amendment on the subject. In the present case, as in *Owens*, Felix was free to cross-examine the witness on "such matters as the witness' bias, his lack of care and attentiveness, his poor eyesight, and even (what is often a prime objective of cross-examination . . .) the very fact that he has a bad memory." *Owens*, 484 U.S. at 559. The state court's ruling was not contrary to, nor an unreasonable application of, either *Owens* or *Douglas*, nor did it involve an unreasonable determination of the facts. We therefore affirm the district court's dismissal of this claim.[6]

CONCLUSION

Felix's coerced confession claim relates back under Federal Rule of Civil Procedure 15(c)(2) to his timely original petition because it arose out of the same conduct, transaction, or

---

6. Our rejection of Felix's Confrontation Clause claim on the merits makes it unnecessary for us to address the State's alternative contention that Felix is seeking the benefit of a new rule that could not be applied retroactively to his case. *See Teague v. Lane*, 489 U.S. 288 (1989).

occurrence set forth in his original pleading — namely, his state trial and conviction. We reverse the district court's dismissal of that claim and remand for further proceedings with regard to it. We affirm the district court's dismissal of Felix's Confrontation Clause claim.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

TALLMAN, Circuit Judge, concurring in part and dissenting in part:

I

Today the court holds that the petitioner's newly-minted and untimely-raised coerced confession claim is saved by the "relation back" doctrine of Fed. R. Civ. P. 15(c)(2) because it "arises from the same transaction—his trial and conviction" as petitioner's timely-filed Confrontation Clause claim. By defining "conduct, transaction, or occurrence" so broadly that any claim stemming from pre-trial motions, the trial, or sentencing relates back to a timely-filed habeas petition, the court obliterates AEDPA's one year statute of limitation.

The majority of those circuits to consider the intersection of Rule 15(c) and Congress' strict statute of limitation have more narrowly interpreted "conduct, transaction, or occurrence" to mean that in order to relate back, "the untimely claim must have arisen from the 'same set of facts' as the timely filed claim, not from separate conduct or a separate occurrence in 'both time and type.' " *Davenport v. United States*, 217 F.3d 1341, 1344 (11th Cir. 2000).[1] I

---

1. *Accord United States v. Hicks*, 283 F.3d 380, 389 (D.C. Cir. 2002); *United States v. Pittman*, 209 F.3d 314, 318 (9th Cir. 2000); *United*

would follow this better reasoned rule because it pays proper respect to the limitation period established by AEDPA. I thus respectfully dissent from Section A of the court's opinion. I agree with the court that the petitioner's Confrontation Clause claim fails on the merits.

II

The "relation back" doctrine is not easily applied to habeas corpus petitions. Habeas corpus litigation is, by definition, a collateral attack on the finality of a criminal judgment following direct appeal or a conscious decision to forgo direct attack. Although we have held that Rule 15 applies to habeas petitions, *Anthony v. Cambra*, 236 F.3d 568, 576 (9th Cir. 2000), we have never considered the limits of how such amendments interact with the limitation period. In doing so, we must keep in mind that by enacting strict time restrictions on the filing of habeas petitions, Congress obviously intended to expedite the processing of collateral attacks. *See United States v. Hicks*, 283 F.3d 380, 389 (D.C. Cir. 2002).

In this case, there have already been several rounds of criminal and civil collateral review at all levels of the California trial and appellate court system, which spanned three years. The petitioner timely filed his original pro se habeas petition in federal court on May 8, 1998, within the limitation period. Although well aware of the facts supporting his coerced confession claim when he filed this original petition, he waited nine months to amend it and add the new claim. Petitioner is certainly entitled to continue testing the validity of his otherwise final state first-degree murder conviction by now proceeding in federal court. But the law requires him to bring all of the claims about which he

---

States v. Duffus, 174 F.3d 333, 337 (3d Cir. 1999); *United States v. Craycroft*, 167 F.3d 451, 457 (9th Cir. 1999).

clearly possesses the facts in a timely-filed habeas petition. *See United States v. Pittman*, 209 F.3d 314, 318 (4th Cir. 2000) (finding that petitioner's claims in the amended petition "were not overly technical and he could have easily included them in his original [petition]").

Rejecting this court's interpretation of "conduct, transaction, or occurrence" as too expansive, our sister circuits have observed:

> Yet this holding views "occurrence" at too high a level of generality. The fact that amended claims arise from the same trial and sentencing proceeding as the original motion does not mean that the amended claims relate back for purposes of Rule 15(c). If we were to craft such a rule, it would mean that amendments . . . would almost invariably be allowed even after the statute of limitations had expired, because most [habeas] claims arise from a criminal defendant's underlying conviction and sentence. Such a broad view of "relation back" would undermine the limitations period set by Congress in the AEDPA.

Pittman, 209 F.3d at 318.

The better rule is that enunciated by the Eleventh Circuit in *Davenport*:

> In order to relate back, the untimely claim must have arisen from the "same set of facts" as the timely filed claim, not from separate conduct or a separate occurrence in "both time and type."

217 F.3d at 1344. The whole point of enacting AEDPA was to eliminate drawn-out and unlimited collateral attacks on

criminal judgments. *See Hicks*, 283 F.3d at 389; *Pittman*, 209 F.3d at 318. In its zeal to allow this late claim to be addressed on the merits, the court invokes the "relation back" doctrine to swallow AEDPA's statute of limitation, rendering it a virtual nullity through which an unlimited number of amendments must be liberally permitted so long as the original collateral attack was timely filed.[2]

III

The court glosses over the fact that by applying the "relation back" doctrine in these circumstances, the original petition utterly failed to give fair notice to the State of the petitioner's new claim. The court relies on *Kern Oil & Refining Co. v. Tenneco Oil Co.*, 840 F.2d 730 (9th Cir. 1988), which involved a typical civil action for breach of contract and fraud, for the proposition that notice is irrelevant. However, in *Anthony v. Cambra*, 236 F.3d 568 (9th Cir. 2000), we acknowledged that the notice inquiry is indeed proper in the application of Rule 15(c) to amend habeas petitions. My colleagues unpersuasively distinguish our discussion of Rule 15(c) in *Anthony*, where we held that a petitioner's amended petition related back because each of its specific claims had been set forth in the original petition. *Id.* at 576. Relying on the guiding principle that "the touchstone of Rule 15(c) is

---

2. The court states that the more narrow interpretation underestimates the incentive for a petitioner to file on time because of the possibility that the district court might rule on the petition before he files an amendment. It is the court that underestimates the amount of time required by our district judges to consider and resolve habeas petitions. This case, pending for four years and three months before entry of final judgment, is a good example. Under the court's expansive invocation of Rule 15(c), petitioner presumably could have amended his petition any number of times as long as "justice so require[d]." District courts would have difficulty ever bringing habeas cases to a close if the broad rule preferred by my colleagues is allowed to stand.

notice," we found that "it is plain that the central policy of Rule 15(c)—ensuring that the non-moving party has sufficient notice of the facts and claims giving rise to the proposed amendment—ha[d] been satisfied." *Id.* (distinguishing the results in *Duffus* and *Craycraft* because "in those cases, the courts specifically relied on the *absence* of notice to the state regarding the content of the proposed amendments as grounds for denying the motions"). Not only is the requirement of fair notice supported by our court's own precedent, this rationale has also been adopted by our sister circuits. In *Craycraft*, the Eighth Circuit relied on the lack of sufficient notice to find that an amendment did not relate back:

> Craycraft's original complaint alleged deficiencies of representation distinctly separate from the deficiency alleged in his amendments. Failing to file an appeal is a separate occurrence in both time and type from a failure to pursue a downward departure or failure to object to the type of drugs at issue. We cannot say that his original petition would provide notice of such a different sort of theory. Therefore, the amendment cannot relate back under Rule 15(c) and it must be time barred.

Id. Neither my colleagues nor the Seventh Circuit in *Ellzey v. United States*, 324 F.3d 521 (7th Cir. 2003), which the court embraces, have offered a convincing reason to deviate from "the central policy of Rule 15(c)—ensuring that the nonmoving party has sufficient notice of the facts and claims giving rise to the proposed amendment." *Anthony*, 236 F.3d at 576.

IV

In this case, the petitioner's timely-filed claim alleged that his Sixth Amendment right to confront witnesses was violated when the court admitted during his 1995 trial a

videotaped police interview of one of the State's witnesses. The petitioner's untimely claim alleges that the trial court improperly denied a pre-trial motion to suppress petitioner's incriminating statement made to police on October 28, 1993. Here, it simply cannot be said that these claims arise from the same set of facts; rather, they arise from distinctly separate occurrences of both time and type. *See Hicks*, 283 F.3d at 389 (holding that a claim that the government failed to prove the quantity of drugs at trial did not relate back to a timely-filed claim that the government's willingness to grant leniency in exchange for testimony tainted the petitioner's trial).[3/]

V

While an amendment offered to clarify or amplify the facts already alleged in support of a timely claim may relate back, an amendment that introduces a new legal theory based on facts different from those underlying the timely claim may not. *See Hicks*, 283 F.3d at 388. "These principles are

---

3. *See also Davenport*, 217 F.3d at 1346 (newly offered claims of ineffective assistance of counsel did not relate back to timely-filed claims of ineffective assistance of counsel because they were raised on different sets of facts); *Pittman*, 209 F.3d at 317-18 (claims regarding obstruction of justice enhancement and failure of counsel to file an appeal did not relate back to claims that the district court lacked jurisdiction to impose an enhanced sentence and the government failed to establish by a preponderance of the evidence that the drugs at issue were crack cocaine); *Duffus*, 174 F.3d at 337-38 (claim of ineffective assistance of counsel for failing to move to suppress evidence did not relate back to claim of ineffective assistance of counsel for failing to contend on appeal that evidence was insufficient to support conviction); *Craycraft*, 167 F.3d at 457 (deficiencies of representation alleged in timely-filed petition were separate from the deficiencies alleged in the untimely amended claims because "[f]ailing to file an appeal is a separate occurrence in both time and type from a failure to pursue a downward departure or failure to object to the type of drugs at issue").

faithful both to the underlying purposes of Rule 15(c) and to the concerns about drawn-out and unlimited collateral attacks on . . . criminal judgments evinced by the passage of AEPDA. They ensure that relation back will be allowed only where the original motion provides adequate notice of the [petitioner's] claims and the proposed amendment would neither change the fundamental nature of those claims nor prejudice the [State's] defense by requiring it to prepare its case anew." *Id.* at 389.

The petitioner's original habeas petition challenging the introduction of his former co-defendant's videotaped interview was timely. "His amendments thereto were not." *Craycraft*, 167 F.3d at 456. I respectfully dissent from application of the "relation back" doctrine to preserve his amended but time-barred coerced confession claim simply because it relates to his underlying conviction and sentence.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

JACOBY LEE FELIX,

Petitioner, No. CIV S-98-0828 WBS GGH P

vs.

DENEICE A. MAYLE, ORDER

Respondent.

_____/

Petitioner, a state prison represented by the Federal defender, has filed this application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local General Order No. 262.

On May 14, 2002, the magistrate judge filed findings and recommendations herein which were served on all parties

and which contained notice to all parties that any objections to the findings and recommendations were to be filed within twenty days. Petitioner has filed objections to the findings and recommendations, and respondent has filed a reply.

In accordance with the provisions of 28 U.S.C. § 636(b)(1)(B) and Local Rule 72-304, this court has conducted a de novo review of this case. Having carefully reviewed the entire file, the court finds the findings and recommendations to be supported by the record and by proper analysis.

Accordingly, IT IS HEREBY ORDERED that:

1. The findings and recommendations filed May 14, 2002, are adopted in full; and

2. Claim 1 is dismissed as time barred. Claim 2 is denied on the same basis as set forth in the initial Findings

and Recommendations.

DATED: ~~July~~ 6/8, 2002.

/s/
UNITED STATES DISTRICT JUDGE

/felix828.805

APPENDIX C

FILED
Feb - 9 2001
Clerk, U.S. District Court
Eastern District of California

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

JACOBY LEE FELIX,

Petitioner, No. CIV S-98-0828 WBS GGH P

vs.

DENEICE A. MAYLE,

Respondent. FINDINGS &

_____/ RECOMMENDATIONS

I. INTRODUCTION

Petitioner is a state prisoner represented by the Federal Defender and proceeding with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner challenges his 1995 conviction for first degree murder with the special circumstance that it was committed during a robbery (Cal. Penal Code §§ 187(a) and 190.2(a)(17)); enhancement for use of a weapon (Cal. Penal Code § 12022.5); and second degree robbery (Cal. Penal Code § 211). Petitioner was sentenced to

life without the possibility of parole, plus a stayed term of five years for robbery, plus one year for use of a weapon during the crime.

II. BACKGROUND[1/]

Around 11 p.m. on the night of September 21, 1993, Lawrence Gallow and his girlfriend Paula were driving in their automobile when his car stalled near the corner of Eighth Avenue and San Jose Way in Sacramento. After ascertaining that the car was out of gas, Gallow went across the street to ask a man who was smoking a cigarette if he could give them a lift to the gas station. The man, later identified as Richard Harper, agreed.

The three of them walked over to Harper's car and Paula was just about to get in, when a man wearing a hood and a red rag over his face approached and ordered them at gunpoint to "give up the car." Gallow told Paula to "run" and fled himself, taking cover behind his own car. From there, he observed two more men, also wearing hoods on their heads and rags over their faces, approach the scene. One man, who appeared to have a handgun, walked toward Harper's car, while the third man, who was holding a big military-style weapon, stood in the middle of the intersection.

---

1. The factual background is taken from the court of appeal's opinion, issued February 25, 1997. Attachment 3 to Answer. This rendition of the facts is not disputed by petitioner. The court notes with appreciation respondent's detailed recitation of the facts.

Gallow took off running and was closely pursued by the man with the big gun. He jumped over a fence and through some yards and was turning a corner when the pursuer fired at least one shot at him. He ultimately evaded his assailant and found his way home safely.

Harper also fled on foot but was not so lucky. The other robbers gave chase and shot at him several times. He was found dead in a field not far from his car, with a bullet in the back of his head.

After shooting Harper, the two robbers entered his car and drove away with the headlights turned off. That night, Harper's car was seen pulling up in the vicinity of defendant Felix's house at 11th Avenue and Santa Cruz way, followed five to ten minutes later by Felix's green Caprice. Three or four men got out of the Caprice and stood around talking while the passenger door to Harper's car remained open. Harper's car was discovered by police the next morning at the same location with a broken dashboard and wires hanging down from the steering wheel. A palm print and a fingerprint belonging to defendant Lawson were recovered from the back of Harper's car.

A month later Nathan Potts, who had been arrested for armed robbery, negotiated a deal with detectives to provide information and testimony about the Harper murder in exchange for a promise of no prison time. Potts testified that at the time of the murder he was a good friend of Lawson's, who lived upstairs from him, and was also acquainted with Felix. Early one morning, shortly after the murder, Potts was awakened by loud music playing

outside on the street. He went outside and saw Felix and Lawson standing around their cars. Felix was working on his car hooking up "some music [amplifiers, speakers, etc.]," with Lawson's assistance.[2] Lawson asked Potts if he had heard about the killing on Eighth Avenue. When Potts replied affirmatively Lawson admitted he had been involved. He said he had chased someone with a gun and fired his weapon, but was unsure if he hit anyone. Felix said that a woman might have seen him and he was "going back to smoke [shoot] her."

Some time later. Felix, who appeared very upset, told Potts that people were trying to implicate him in the murder; that he 'already had his story straight;' and that if the police contacted him he would have an alibi.

When Felix and Lawson were interviewed by police, each gave false and/or contradictory statements concerning their activities on the night of the murder.

The centerpiece of the prosecution's case was an interview given by Kenneth Williams to Police Detective Toni Winfield, who was investigating Harper's murder. The interview was transcribed and videotaped, and portions of the tape were played during Williams's [sic] testimony. Williams, who was in custody at the time on a minor unrelated matter, appeared nervous and upset, crying at the beginning of the interview

---

2. Potts testified that the men were hooking up 12-inch speakers to Felix's car. Another witness, Kenneth Williams, told police he saw both defendants taking a pair of 12-inch speakers out of Harper's car.

because "I don't want to snitch on my homies [best friends]." He told Winfield that just before the robbery he overheard Felix, Lawson and a third man, Ellis Curtis,[3] planning to "jack the dude" who lived around the corner for some "weed," meaning to rob Harper to obtain marijuana.[4] Felix had an automatic weapon and Curtis had a .38 revolver.

Williams saw the three men go around the corner and about two minutes later he heard six or seven shots ring out. He then observed Curtis and Felix hop into Harper's car and drive off. Williams saw the trio a short time later going through Harper's car. Williams asked Felix whether he had shot Harper, and Felix replied, 'I think so.'

At trial, Williams consistently denied any memory of the interview with Detective Winfield, despite being shown videotape excerpts in front of the jury.

Plaintiff was convicted, along with co-defendant Lawson, on July 6, 1995. On October 19, 1995, petitioner filed a notice of appeal with the state appellate court which was denied on February 25, 1997. Attachments 1 and 3 to Answer. On approximately April 3, 1997, petitioner filed a

---

3. Although the information is not readily available in the record, the Attorney General represents, without contradiction, that Curtis was convicted in a prior joint trial with Lawson and that the trial below was a retrial of Lawson, the first jury having deadlocked over Lawson's guilt.

4. Harper was known in the neighborhood as a marijuana dealer.

petition for review with the California Supreme Court.[5] Attachment 5 to Answer. That petition was denied on May 14, 1997. Attachment 6 to Answer. Petitioner filed his original pro se habeas petition with this court on May 8, 1998. On May 29, 1998, this court appointed the Federal Defender to represent petitioner. On January 28, 1999,[6] petitioner filed an amended petition, which deleted some claims and added two claims which had not been exhausted in the state court: "the state trial court violated petitioner's right to due process and against self-incrimination under the Fifth and Fourteenth Amendments by admitting into evidence petitioner's involuntary statements to police; Petitioner's right to effective assistance of counsel under the Sixth and Fourteenth Amendments was violated by his appellate counsel's failure to raise this claim on direct appeal." Am. Petition, at 2-3. Petitioner filed an exhaustion petition with

---

5. This filing reflects a docketed date of April 3, 1997.

6. Petitioner filed a copy of his amended petition on February l, 1999, which additionally contained petitioner's signature.

the California Supreme Court on February 2, 1999, raising these claims. Attachment 7 to Answer. It was denied on May 26, 1999. Attachment 8 to Answer. In the meantime, respondent had filed a motion to dismiss for lack of exhaustion which was later vacated from the calendar pursuant to respondent's request after petitioner had exhausted these claims. Respondent filed an answer on September 29, 1999. Petitioner filed a traverse on January 21, 2000.

The amended petition raises the following claims: (1) "the state trial court violated petitioner's right to due process and against self-incrimination under the Fifth and Fourteenth Amendments by admitting into evidence petitioner's involuntary statements to police; Petitioner's right to effective assistance of counsel under the Sixth and Fourteenth Amendments was violated by his appellate counsel's failure to raise this claim on direct appeal;" (2) "the state rial court violated petitioner's right to confront witnesses

by admitting into evidence portions of he videotaped interrogation of Kenneth Williams who, at trial, denied any memory of the interview." Respondent, in its answer, raises the defense that the claims in ground one are barred by the statute of limitations.

After carefully reviewing the record, the court recommends that the petition be denied.

III. DISCUSSION

A. Statute of Limitations in Regard to Ground One

Petitioner's ground one involves his recorded interrogation by the police. Petitioner made no dramatic confession in his interrogation; however, he did make statements that later proved to be inconsistent with other evidence, and his demeanor during the statement could have been seen by the jury as exhibiting a consciousness of guilt. The state court suppressed the latter portion of the interrogation because of promises that the police made to petitioner to induce further inculpatory remarks. However, a

good deal of the interrogation was available for use at trial. Petitioner claims herein that the police used coercive tactics even for the first part of the interrogation, and that the entire interrogation should have been suppressed. The problem with reviewing this claim on the merits is that petitioner did not raise it until after the AEDPA statute of limitations had expired.

On April 24, 1996, the Antiterrorism and Effective Death Penalty Act (AEDPA) was enacted. AEDPA amended 28 U.S.C. § 2244(d)(l) so that it now provides,

> A 1 -year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of-
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

On May 14, 1997, the California Supreme Court denied petitioner's petition for review. Respondent's Attachment 6. The finality of petitioner's conviction for AEDPA purposes was ninety days after the California Supreme Court denied his petition for review, i.e., on August 12, 1997. See Bowen v. Roe, 188 F.3d 1 157 (9th Cir. 1999). Petitioner had until August 12, 1998, i.e., one year from August 12, 1997, to file his federal petition. The amended claims, first added to the petition on January 28, 1999, are not timely.

Statutory Tolling

Section 2244(d)(2) provides that the time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or

claim is pending shall not be counted toward any period of limitation under this subsection. Petitioner filed his only state habeas petition in the California Supreme Court on February 2, 1999. Attachment 7 to Answer. Because this petition was not filed within the limitations period, it does not toll the statute.

Petitioner's original federal habeas petition also failed to toll the statute. Section 2254(d)(2) does not toll the limitations period while a federal habeas petition is pending. Jiminez v. Rice, 222 F.3d 1210, 1214 (9th Cir. 2000).

Equitable Tolling

In Calderon v. United States District Court (Beeler), 128 F.3d 1283, 1288-89 (9th Cir. 1997), overruled on other grounds, Calderon v. U.S. District Court (Kelly), 163 F.3d 530 (9th Cir. 1998), the Ninth Circuit found that the statute of limitations could be equitably tolled if extraordinary circumstances beyond a prisoner's control made it impossible to file the petition on time.

Equitable tolling will not be available in most cases because tolling should only be granted if extraordinary circumstances beyond a prisoner's control make it impossible for him to file a petition on time. As held in Beeler, "[w]e have no doubt that district judges will take seriously Congress's desire to accelerate the federal habeas process, and will only authorize extensions when this high hurdle is surmounted." 128 F.3d at 1289. "Mere excusable neglect" is insufficient as an extraordinary circumstance. Miller v. New Jersey Dept. of Corrections, 145 F.3d 6 16, 6 19 (3rd Cir. 1998). Moreover, ignorance of the law, or even illiteracy, does not constitute such extraordinary circumstances. See Hughes v. Idaho State Bd. of Corrections, 800 F.2d 905, 909 (9th Cir. 1986). Indeed, mere ignorance of the law, or pro se status, assuming one had reasonable access to discovering the law, is universally held not to be an extraordinary circumstance. Marsh v. Soares, 223 F.2d 1217, 1220 (10th Cir. 2000); Fisher v. Johnson, 174 F.3d 7 10, 714 (5th Cir.

1999); Miller, supra. Compare Whalem-Hunt v. Early, 233 F.3d 1146 (9th Cir. 2000) (en banc) (absence of pertinent legal materials from prison law library for a lengthy time within the limitations period *might* qualify as an impediment establishing equitable tolling).

Petitioner claims as justification for the tardy submission of Ground One, without declaration, that he is "untrained in the law," Traverse at 5, petitioner was truly "'on his own'" in discovering potential habeas claims, and petitioner's indigency prevented his obtaining representation. Traverse at 6. Petitioner does not assert that the law library at his institution(s) did not contain access to the pertinent law. If petitioner's reasons for equitable tolling were permitted here, the extraordinary circumstances would apply to nearly every late filing by a pro se prisoner (the vast majority of habeas applicants). Extraordinary would become routine.

Relation Back Doctrine

Having determined that the statute of limitations would

bar the belated claim, and that tolling is inappropriate, the entire issue of the propriety of the proposed addition of a claim now hinges upon the relation back doctrine of amended pleadings (Fed. R. Civ. P. 15(c)).

Fed. R. Civ. P. 15 (amendment of pleadings) applies to habeas corpus actions, including those filed after the AEDPA. Calderon v. U.S.D.C. (Taylor), 134 F.3d 981.986 (n.6) (9th Cir. 1998); Anthony v. Cambra, ___ F.3d ___, 2000 WL 1838960 (December 15, 2000). Rule 15(c)(2) provides that an amendment of a pleading relates back to the date of the original pleading when the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading.

Five recent "relation back" habeas cases warrant mention. In United States v. Craycraft, 167 F.3d 451, 456-57 (8th Cir. 1999), petitioner sought to amend his petition, and his ineffective assistance of counsel claim, by adding an

additional theory of ineffective assistance. Craycraft held that theories of ineffective assistance of counsel which were distinct from previously stated theories did not relate back under Rule 15. United States v. Duffus, 174 F.3d 333, 337 (3rd Cir. 1999) followed Craycraft, and held that while it was permissible to amend to clarify a previously stated theory of ineffective assistance of counsel, a "new" theory of ineffective assistance-in this case, failure to move to suppress evidence-was distinct from previously stated theories, and would not relate back to the filing of the initial petition. These cases render persuasive examples of the propriety of "relation back" of sought amendments to habeas corpus petitions. The rationale of these cases was adopted in United States v. Pittman, 209 F.3d 314 (4th Cir. 2000). See also McClain v. Hill, 52 F. Supp. 2d 1133, 1144 (C.D.Cal. 1999) (appellate ineffective assistance claim did not relate back). A fifth and most recent relation back case, Anthony v. Cambra, ___ F.3d ___, 2000 WL 1838960 (9th Cir. December 15,

2000), is distinguishable. The Ninth Circuit allowed a claim to relate back because the policy behind Rule 15(c), notice by the non-moving party, had been satisfied. There, the original petition contained the unexhausted claim, giving notice to respondent. In this case, the original petition did not contain the new claim which was not presented to this court or to respondent until January 28, 1999, when petitioner filed an amended petition.

In this case, petitioner's only argument is that the claims in ground one relate back because they are based on the same criminal conviction and that equity requires relation back. These circumstances are not sufficient to warrant application of the relation back doctrine. The claims in ground one which concern petitioner's allegedly involuntary statements to police do not arise out of the same conduct, transaction or occurrence as the videotaped interrogation of Kenneth Williams which is the only other claim remaining.

Suspension Clause/Actual Innocence

Some courts have suggested that dismissal of actual or legal innocence claims on grounds that they are barred by the statute of limitations violates the Suspension Clause (U.S. Const. art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus may not be suspended, unless when in Case of Rebellion or Invasion the public Safety may require it.")). See Rodriguez v. Artuz, 990 F. Supp. 275,283 (S.D.N.Y. 1998), affirmed, 161 F.3d 763 (2nd Cir. 1998) ("where no claim of actual or legal innocence was raised, as long as the procedural limits on habeas leave petitioners with some reasonable opportunity to have their claims heard on the merits ...[there is no] suspension of the writ.") See also United States v. Zuno-Arce, 25 F. Supp. 2d 1087, 1099-1100 (C.D.Cal. 1998), affirmed, 209 F.3d 1095 (9th Cir. 2000). Accordingly, this court considers whether petitioner's claims involve actual or legal innocence.

After reviewing the amended petition. answer, and traverse, the court finds that petitioner's newly added claims about coercive tactics at an interrogation do not sufficiently demonstrate his innocence. It is therefore recommended that ground one be dismissed as barred by the statute of limitations.

B. Ground Two - Confrontation Clause Violation

Petitioner alleges that his right to confront prosecution witness Kenneth Williams was violated because the trial court admitted a prior videotaped interrogation of Williams at trial; yet Williams denied any memory of that interview at trial. Petitioner argues that an unresponsive witness such as Williams is not subject to confrontation because the prosecution is required to read the prior statement imputed to the witness but not admitted by him, and that statement cannot be tested on cross-examination.

Introduction

This issue involves complex, sophisticated issues from

both a procedural and merits standpoint. The applicability, overlap and precedence of the Teague new rule jurisprudence is unclear after Williams (Terry) v. Taylor, 529 U.S. 362, 1205 S. Ct. 1495 (2000) (reviewing what is clearly established law and application thereof in the AEDPA context). On the merits, the determination of whether the Supreme Court law that exists on the Confrontation Clause is sufficiently specific to encompass the present situation is also vigorously disputed.

For the reasons that follow, the court finds that a ruling in favor of petitioner would constitute a new rule of law which cannot be applied on this collateral review. Even if the Teague rule would not apply, the court finds that the decisions of the state courts on this issue were not contrary to clearly established Supreme Court authority, nor were they an unreasonable application of analogous, arguably applicable Supreme Court authority.

Background

During the videotaped interview, which showed an upset Williams crying that he did not want to "snitch on [his] homies," Williams implicated petitioner in the shooting. (RT. 536-37, 535:28-36:14). Perhaps, it is best now to reiterate the short passage from the Court of Appeal concerning the videotaped statement:

> The centerpiece of the prosecution's case was an interview given by Kenneth Williams to Police Detective Toni Winfield ... Williams, who was in custody at the time on a minor unrelated matter, appeared nervous and upset, crying at the beginning of the interview because "I don't want to snitch on my homies [best friends]." He told Winfield that just before the robbery he overheard Felix, Lawson and a third man, Ellis Curtis, planning to "jack the dude" who lived around the comer for some "weed," meaning to rob Harper to obtain marijuana. Felix had an automatic weapon and Curtis had a .38 revolver. Williams saw the three men go around the corner and about two minutes later he heard six or seven shots ring out. He then observed Curtis and Felix hop into Harper's car and drive off. Williams asked Felix whether he had shot Harper, and Felix replied, 'I think so.'

Clearly, the videotape statements were critical to the prosecution's case. The prosecution brought out what was on

the videotape by asking Williams direct questions as to what he had heard or observed and also questions about what he said on the videotape. The defense objected to the showing of the videotape, based on unfair prejudice (RT. 53 1 :2, 530:5-6), defense counsel also made several objections to specific portions of the case, but those are not at issue here. The trial court overruled the initial objection. (RT. 53 1 :2). Williams testified at trial that he did not recall the interview that had just been shown to the jury. (RT. 540-41). He answered most questions with the response, "I don't recall," or "I don't remember." (RT. 540-52). Williams did testify that he did not want to get petitioner in trouble and that petitioner was his friend. (RT. 552:3-4, 535:28-36:s). For the most part, the colloquy on direct exam proceeded as follows:

> Q How long have you and Jacoby Felix been friends?
>
> A Too long.
>
> Q Too long for what?

A Long time.

Q Are you good friends with him?

A Yes.

Q Do you want to testify against him in this case?

A No.

Q Have you told me that?

A Yes.

Q One time or more than one time?

A A long time.

...

Q Are you here in court today because you want to be here?

A No. Because they ordered me back here.

Q Is that the only reason that you're in court today?

A Uh-huh.

Q You have to say yes or no -

A Yes.

(RT. 520-21).

Q And was there a - a night in September of 1993 when you were out on 8th Avenue when you heard some gunshots?

A I don't know. I don't remember.

Q Did you give a statement to a Detective Winfield in this case?

A I don't even know.

Q Have you testified about this on prior occasions?

A I don't remember. One time I did.

(RT. 524-25).

Q Did you hear Mario Lawson, Jacoby Felix and Ellis Curtis having a conversations [sic] on 8th Avenue?

A I don't remember. It was a long time ago.

MS. MCGUIRE: It's the same exhibit, your Honor. Page eleven, line fifteen through twenty-eight. Excuse me, fifteen through twenty-three.

(Videotape played.)

By MS. MCGUIRE:

Q Did you tell Detective Winfield that you were not in

the conversation, it was just them three?

A I don't know.

Q Is that you in the room with Detective Winfield?

A It looked like.

Q Did you say it was Jacoby and Mario?

A I don't know.

Q And Curtis?

A I don't know.

Q Was that you in the room with Detective Winfield?

A It looked like. I'm not looking at that tape. I don't know who that is on that tape.

Q What was the conversation they were having about?

A I don't know.

(RT. 537-38).

Q Now, Mr. Williams, do you remember telling her that the three were having a conversation about going around the corner to Jack the dude for some weed?

A I don't know.

Q Is that you in the videotape?

A I don't know.

Q What does Jack mean?

A I don't know.

Q Have you heard that phrase before?

A No.

Q You used it in the tape, didn't you?

A I don't know.

Q Did you see anybody with guns out there that day?

A No.

(RT. 539-40).

Q Did you tell Detective Winfield that Ellis Curtis had a .38?

A I don't know.

Q Is that you in the videotape?

A Yeah.

Q Did you tell her that Jacoby Felix had an automatic?

A I don't know.

Q Was that you in the videotape?

A It looked like.

Q Have you heard the word strap before?

A Huh-uh.

Q Do you know what strap means?

A No.

Q Was that you in the videotape?

A It don't know. It looked like it.

Q Detective Winfield asked you how it was you saw the guns?

A I don't remember.

Q Did you talk to Detective Winfield about how it was you saw the guns?

A I don't remember.

(RT. 540-41).

On cross examination, defense counsel for both petitioner and co-defendant Lawson questioned Williams about his prior testimony at a preliminary examination, about

his statements to police, and about the actual incident. (RT. 555-574). Throughout the entire cross-examination which covers almost twenty pages, Williams responded that he did not remember or that he did not know.

Much later, petitioner's counsel moved to strike Williams' testimony based on the Sixth Amendment's confrontation clause. Counsel complained that Williams was not available for further cross-examination, but the primary grounds for the motion was Williams' refusal to say much more than "I don't remember" when he was being cross-examined. Petitioner's trial counsel argued that Williams was effectively unavailable for cross-examination in court. The motion was denied, with the court's explanation that:

> There were transcripts of his prior testimony available to impeach him. There were statements that he had made to the detectives which were available to both the prosecution and the defense to impeach him.
>
> His failure of recollection was obviously contrived, which is why the statements that he made on those previous occasions are admissible as evidence, available for consideration by the jury.

> The jury also has to consider the affect [sic] of his attitude toward the giving of testimony and his conduct here in this Court in weighing his credibility and in determining what weight, if any, they will give to his testimony. That was very apparent. There was ample ammunition for the attorneys on both sides to use to examine Mr. Williams. And the fact that he is a hostile witness is not something that is the [sic] result in the striking of his testimony.

(RT. 1217).

In the instant case, the California Court of Appeal addressed this issue:

> [Defendants'] argument presupposes that Williams's [sic] lack of memory was genuine and not feigned, for if it was feigned, the law is well established that the interview statements would be admissible. 'Inconsistency in effect, rather than contradiction in express terms, is the test for admitting a witness' [s] [sic] prior statement [citation], and the same principle governs the case of the forgetful witness.' (*People v. Green, supra*, 3 Cal.3d at p. 988.) *When a witness's claim of lack of memory amounts to deliberate evasion, inconsistency is implied.* (Id. At pp. 988-989.) 'As long as there is a reasonable basis in the record for concluding that the witness's 'I don't remember' statements are evasive and untruthful, admission of his or her prior statements is proper." (*People v. Johnson* (1992) 3 Cal.4th 1183, 1219-1220.)

Defendants did not request the court make a finding that Williams was being truthful in his claimed memory loss, rendering him unavailable as a witness. (Evid. Code, § 240; see *People v. Price* (1991) 1 Cal.4th 324, 413.) Since there was no request for a judicial determination of this preliminary fact, we imply a finding Williams was not unavailable as a witness from the court's admission of his testimony. (Evid. Code, § 402, subd. (C).)

> The trial court's comments in response to defendants' motion to strike Williams's [sic] testimony show it considered his 'memory loss' to be disingenuous. [footnote omitted]. This finding has ample support in the record. Numerous times, when asked if he remembered the statements being shown in the videotape, Williams, rather than claiming memory loss, said 'I don't know.' When asked why he was telling the jury that he did not remember anything, Williams replied, 'Because I don't feel like being here period.' Significantly, one of the few admissions Williams did make during his trial testimony was that he was crying during the interview because he did not want to 'tell on them [defendants].'
>
> Substantial evidence supports the court's determination that Williams was an evasive and hostile prosecution witness. His statements at the Winfield interview were therefore properly admitted to impeach him. (*Johnson, supra*, 3 Cal.4th at pp. 1219- 1220.)

Answer, Attachment 3 at 8-9.

Applicability of Teague v. Lane's New Rule Jurisprudence

Respondent desires a rule of preclusion based on the Confrontation Clause for admission of a pretrial statement, here a videotape, of a witness who purposefully "forgets to remember" about the substance of the pretrial statement or even about the making of the statement itself.[7] Assuming that petitioner's asserted rule would be announced (or has been announced since petitioner's conviction became final (August 12, 1997)), the issue becomes whether petitioner's assertion is a "new rule," and then if so, whether this "new rule" would be applied to petitioner's conviction.

The court first finds that there is insufficient connection between 28 U.S.C. 2254(d) (AEDPA) and Teague v. Lane, 489 U.S. 288,109 S. Ct. 1060 (1989) such that the statute has

---

7. Petitioner does not contest the admission of the videotape on grounds that California's hearsay rule was violated. As indicated by the Court of Appeal, a pre-trial statement made by one who feigns memory loss at trial is considered a prior inconsistent statement. See also People v. Perez, 82 Cal. App. 4th 760, 764, 98 Cal. Rptr. 2d 552, 524 (2000). A prior inconsistent statement, once admitted, is admitted for substantive as well as impeachment purposes. People v. Hawthorne, 4 Cal. 4th 43, 55 (n.4), 14 Cal. Rptr. 2d 133, 140 (1992).

superseded the case made rule. There is no doubt that the statute and the new rule jurisprudence are directed, at least in part, to the issue of retroactive application of newly stated law in collateral attacks to final convictions. Under § 2254(d), a habeas petition cannot be granted on a legal issue, or mixed factual legal issue unless the state courts' decision was contrary to clearly established law as set forth by the United States Supreme Court, or was an unreasonable application of existing law. Under Teague, a rule of law announced in a case may not be applied to a conviction defined as "final" unless that rule preexisted the finality of the conviction, or two very specific exceptions negate the general preclusion. A rule is "new" if it was not dictated by precedent, i.e., was not clearly established at the time the conviction was final. One clear difference between the statute and Teague is that under Teague a rule could be "old" by looking at all federal case law, and not just that of the Supreme Court.

Justice O'Connor, in writing for the majority of the court

nevertheless held that "the 'clearly established Federal law' phrase bears only a slight connection to our Teague jurisprudence." Williams (Terry) v. Taylor, ___U.S.___ 120 S. Ct. 1495. 1523 (2000). Nevertheless, '[w]ith one caveat, what ever would qualify as an old rule under our Teague jurisprudence will constitute 'clearly established law' ...." Id. While this court understands the two sentences apart from each other, the undersigned is unsure of how to apply Teague and the statute when viewing the sentences together. However, the Ninth Circuit has determined that the first sentence indicates that the statute and Teague should be viewed independently, Van Tran v. Lindsey, 212 F.3d 1143, 1151 (n.13) (2000). Thus, this court will conduct a Teague analysis separate from that of AEDPA. Moreover, case law previous to AEDPA holds that the Teague analysis must be performed prior to an analysis on the merits. Jones v. Gomez, 66 F.3d 199,202 (9th Cir. 1995).

Jones also supplies a good working definition of the Teague rule:

> A rule is "new" for Teague purposes if it was not "dictated by precedent existing at the time the defendant's conviction became final." Id. at ---, 113 S. Ct. at 897 (quoting Teague, 489 U.S. at 301, 109 S. Ct. at 1070). Put another way, the "question is whether a state court considering [the defendant's] claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule [he] seeks was required by the Constitution." Goeke v. Branch, 514 U.S. 115, ---, 115 S. Ct. 1275, 1277, 131 L.Ed.2d 152 (1995) (per curiam) (internal quotations and citations omitted).

Jones v. Gomez, 66 F.3d at 202.

The Confrontation Clause "Legal Landscape"

The legal landscape for the Supreme Court's Confrontation Clause jurisprudence is somewhat rocky from an overall viewpoint. However, the recent evolutions of the case law do not support petitioner's stance. Petitioner relies heavily on an early refusal to testify case, Douglas v. Alabama, 380 U.S. 415, 85 S. Ct. 1074 (1965). As correctly described by petitioner, Douglas involved a situation where

the defendant's accomplice refused to testify on privilege grounds. The prosecutor was then permitted to ask the defendant whether he made a certain statement in his pre-trial confession thereby getting the substance of the incriminating testimony against Douglas before the jury. The Supreme Court found that "the inference from his [the prosecutor's] reading that Loyd made the statement could not be tested by cross-examination. Similarly, Loyd could not be cross-examined on a statement imputed to but not admitted by him." Id. at 419, 85 S. Ct. at 1077.

If Douglas were the only case on the subject, petitioner would be a long way to establishing that an old rule existed which should have been applied to his case. However, the Supreme Court has withdrawn from Douglas in a substantial way. In California v. Green, 399 U.S. 149, 90 S. Ct. 1930 (1970), the Court adjudicated a situation not far removed from the facts herein. A witness' preliminary hearing statement and statement to a detective were permitted to be

used at trial, even though in the words of the state court the witness at trial had "proved to be 'markedly evasive and uncooperative on the stand.'" Id. at 151-152, 90 S. Ct. at 1931. The preliminary hearing testimony had been admitted under California's prior inconsistent statement rule-the same rule at issue here. The Supreme Court found that because the witness was at trial, and his prior preliminary hearing statement had been subject to cross-examination, the fact that he could not be cross-examined as effectively at trial was of not sufficient constitutional significance. Of course, the difference between the case here and Green is that Williams' pre-trial statement herein to the detective was not subject to cross-examination. Nevertheless, the Green court did not find the prior cross-examination to be critical. Important to the issue here, the prior statement to the police officer was also admitted for substantive purposes through the testimony of the police officer. Green commented that:

> There is a narrow question lurking in this case concerning the admissibility of Porter's statements

to Officer Wade. In the typical case to which the California court addressed itself, the witness at trial gives a version of the ultimate events different from that given on a prior occasion. In such a case, as our holding in Part II makes clear, we find little reason to distinguish among prior inconsistent statements on the basis of the circumstances under which the prior statements were given. The subsequent opportunity for cross-examination at trial with respect to both present and past versions of the event, is adequate to make equally admissible, as far as the Confrontation Clause is concerned, both the casual, off- hand remark to a stranger, and the carefully recorded testimony at a prior hearing. Here, however, Porter claimed at trial that he could not remember the events that occurred after respondent telephoned him and hence failed to give any current version of the more important events described in his earlier statement. Whether Porter's apparent lapse of memory so affected Green's right to cross-examine as to make a critical difference in the application of the Confrontation Clause in this case is an issue which is not ripe for decision at this juncture. The state court did not focus on this precise question, which was irrelevant given its broader and erroneous premise that an out-of-court statement of a witness is inadmissible as substantive evidence, whatever the nature of the opportunity to cross-examine at the trial. Nor has either party addressed itself to the question. Its resolution depends much upon the unique facts in this record, and we are reluctant to proceed without the state court's views of what the record actually discloses relevant to this particular issue. What is more, since we hold that the admission of Porter's preliminary hearing testimony

is not barred by the Sixth Amendment despite his apparent lapse of memory, the reception into evidence of the Porter statement to Officer Wade may pose a harmless-error question which is more appropriately resolved by the California courts in the first instance.

California v. Green, 399 U.S. at 168-69, 90 S. Ct. at 1940-41 (footnote 18 omitted but discussed below).

In the footnote referenced above, the Supreme Court considered the precise question at issue here to be an open one: "Even among proponents of the view that prior statements should be admissible as substantive evidence, disagreement appears to exist as to whether to apply this rule to the case of a witness who disclaims all present knowledge of the ultimate event." Justice Harlan, in concurrence, would have found no Sixth Amendment problem in this respect. Id. at 188, 90 S. Ct. at 1951. "The fact that the witness, though physically available, cannot recall either the underlying events that are the subject of an extra-judicial statement or previous testimony or recollect the circumstances under which the statement was given, does not have Sixth

Amendment consequence." Thus, the very issue to be decided here was not dictated by precedent at the time of the Green decision, despite Douglas, and the legal landscape was now looking harsh for petitioner.

In United States v. Owens, 484 U.S. 554, 108 S. Ct. 838 (1988), the Supreme Court believed its case to bring up the issue left open in Green. In this case, an out of court identification was admitted even though the witness had a complete and actual memory loss-the witness could not be cross-examined as to the substance of his identification.

> Here that question [left open in Green] is squarely presented, and we agree with the answer suggested 18 years ago by Justice Harlan. "[T]he Confrontation Clause guarantees only 'an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.'" [citations omitted] As Fensterer [Delaware v. Fensterer, 474 U.S. 15, 106 S. Ct. 292 (1985)] demonstrates, that opportunity is not denied when a witness testifies as to his current belief but is unable to recollect the reason for that belief. It is sufficient that the defendant has the opportunity to bring out such matters as the witness' bias, his lack of care and attentiveness, his poor eyesight, and even (what is often a prime objective of cross-examination, see 3A J. Wigmore, Evidence S 995, pp. 931-932 (J. Chadbourn rev. 1970)) the very fact that he has a bad memory.

Owens, 484 U.S. at 559, 108 S. Ct. at 842.

At this point, petitioner's presumed rule is not only "new," it does not appear to be viable at all. It hangs by the mere distinguishing thread that the memory loss in petitioner's case was purposefully caused while the memory loss in Owens occurred through natural causes. There is no significant difference from a legal standpoint. Both witnesses cannot be cross-examined on the substance of their out-of-court statements. In order for petitioner's rule to be stated, the Supreme Court would have to *now* reverse Owens and state the new rule. Of course, this cannot be accomplished in petitioner's case under Teague. At the very least, a survey of the legal landscape at the time petitioner's conviction became final reveals no "dictated by precedent" rule involving memory loss which could benefit petitioner's case.[8]

---

8. Most appellate courts have had no difficulty in applying Owens. See United States v. Valdez-Soto, 31 F.3d 1467 (9th Cir. 1994).

Accordingly, petitioner's claim herein is barred by Teague.

AEDPA and Clearly Established Law

The AEDPA applies to this petition for habeas corpus which was filed after the AEDPA became effective. Neelley v. Nagle, 138 F.3d 917 (11th Cir. 1998), citing Lindh v. Murphy, 117 S. Ct. 2059 (1997). The AEDPA "worked substantial changes to the law of habeas corpus," establishing more deferential standards of review to be used by a federal habeas court in assessing a state court's adjudication of a criminal defendant's claims of constitutional error Moore v.

Nevertheless, situations arise that require distinguishing Owens such as when a witness invokes a privilege and will not answer any questions before the jury, even questions that might allow the jury to test credibility and bias. See United States v. Vargas, 933 F.2d 701 (9th Cir. 1991). See also United States v. Torrez-Ortega, 184 F.3d 1128 (10th Cir. 1999). In Torrez-Ortega, however, the court seriously misread the later Supreme Court case of White v. Illinois, 502 U.S. 346, 352-53 (n.5, 112 S. Ct. 736 (1992) as limiting Owens and repudiating the Justice Harlan concurrence in Green which the Supreme Court had just so recently adopted. Actually, White was repudiating the Justice Harlan Confrontation Clause flip-flop which he performed some months later in the case of Dutton v. Evans, 400 U.S. 74, 93-100, 91 S. Ct. 210, 221-225 (1970).

There are, of course, other Supreme Court Confrontation Clause cases in the pertinent time period, but none which so clearly outline the legal landscape as those presented in the text.

Calderon, 108 F.3d 261, 263 (9th Cir. 1997).

28 U.S.C. § 2254(d) provides,

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim-
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

In Williams (Terry) v. Taylor, 529 U.S.362, 120 S. Ct. 1495 (2000), the Supreme Court defined the operative review standard set forth in § 2254(d). Justice O'Connor's opinion for Section II of the opinion constitutes the majority opinion of the court. There is a dichotomy between "contrary to" clearly established law as enunciated by the Supreme Court, and an "unreasonable application of " that law. Id. at 1519. "Contrary to" clearly established law applies to two situations: (1) where the state court legal conclusion is

opposite that of the Supreme Court on a point of law, or (2) if the state court case is materially indistinguishable from a Supreme Court case, i.e., on point factually, yet the legal result is opposite.

"Unreasonable application" of established law, on the other hand, applies to mixed questions of law and fact, that is, the application of law to fact where there are no factually on point Supreme Court cases which mandate the result for the precise factual scenario at issue. Williams (Terry), 529 U.S. at ___, 120 S. Ct. at 1520-21 (2000). It is this prong of the AEDPA standard of review which directs deference to be paid to state court decisions. While the deference is not blindly automatic, "the most important point is that an *unreasonable* application of federal law is different from an incorrect application of law. ....[A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or

incorrectly. Rather, that application must also be unreasonable." Williams (Terry), 529 U.S. at ___, 120 S. Ct. at 1522 (emphasis in original). The Supreme Court did not give a more precise definition of "unreasonableness;" however, the Ninth Circuit has determined that "unreasonable" is the equivalent of clear error in the legal context, i.e., that the state decision leaves the federal court with the clear conviction of error as opposed to the decision simply being arguably wrong. Tran v. Lindsey, 212 F.3d 1143, 1153 (9th Cir. 2000).[9/]

In reviewing petitioner's claim under AEDPA, the court seeks to determine whether the decision of the California Supreme Court, and, where appropriate, those of the lower California courts, are an unreasonable application of federal law.

Even if the court were able to get past the Teague bar,

---

9. The legal deference applies to all state courts and not just the highest state court. Of course, if a higher state court has directly spoken to the issue, this federal court would rely on the pronouncement of the higher state court.

petitioner would lose this claim upon application of AEDPA. From the above discussion, it is beyond argument that there is no clearly established law as set forth by the United States Supreme Court which could be applied to benefit petitioner. The decisions of the state courts in this case were not contrary to Supreme Court case law, nor were they unreasonably applying it. The state courts committed no error much less the clear error which must be demonstrated to overturn the state decisions. Tran v. Lindsey, supra.

VI. CONCLUSION

For the reasons stated within this opinion, IT IS HEREBY RECOMMENDED that petitioner's application for a writ of habeas corpus be denied.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(l). Within twenty days after being served with these findings and recommendations, any party may file written objections with

the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections shall be served and filed within ten days after service of the objections. The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

DATED: ~~January~~ Feb 5, 2001.

/s/
GREGORY G. HOLLOWS
UNITED STATES MAGISTRATE JUDGE

GGH:jv:kgm
feli0828.hc

United States District Court
for the
Eastern District of California
February 9, 2001

* * CERTIFICATE OF SERVICE * *

Felix 2:98-cv-00828

v.

Warden

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Eastern District of California.

That on February 9, 2001, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's Office, or, pursuant to prior authorization by counsel, via facsimile.

Jacoby Lee Felix VC/GGH
J-72455
SVSP3 SH/WBS
Salinas Valley State prison
PO Box 1060
Soledad, CA 93960

[Cert. of Service cont'd]

David M. Porter
Federal defender
801 K Street
Suite 1024
Sacramento, CA 95814

Mathew Chan
Attorney General's Office of the State of California
PO Box 944255
1300 I Street
Suite 125
Sacramento, CA 94244-2550

Jack L. Wagner, Clerk

/s/
by: Deputy Clerk

APPENDIX D

FILED
May 14 2002
Clerk, U.S. District Court
Eastern District of California

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

JACOBY LEE FELIX,

Petitioner, No. CIV S-98-0828 WBS GGH P

vs.

DENEICE A. MAYLE,

Respondent. FINDINGS AND RECOMMENDATIONS

/

Introduction and Summary

On February 9,2001, the undersigned issued Findings and Recommendations on petitioner's two claims set forth in the habeas corpus petition filed on May 8, 1998. Claim 1 involved alleged involuntary statements made by petitioner to the police, and appellate counsel's alleged ineffectiveness in not raising that claim on appeal; claim 2 focused on an entirely separate claim-the alleged violation of petitioner's

confrontation rights when a videotaped interrogation of a third party was admitted during trial. The undersigned found that Claim 1 was barred by the statute of limitations, and Claim 2 should be denied on the merits.

On hearing of objections to the Findings, respondent noted that a Ninth Circuit case critical to the statute of limitations, Jiminez v. Rice, 222 F.3d 1210 (9th Cir. 2000), had been withdrawn at the time (246 F.3d 1277 (9th Cir. 2001)). Jiminez had found that the pendency of a federal habeas petition did not statutorily toll the AEDPA limitations period. Hence, petitioner's Claim 1, filed in an amended petition well after the statute of limitations had otherwise run, was time barred. The undersigned found that Claim 1 was entirely distinct from Claim 2 precluding application of the relation back doctrine, i.e., Claim 1 could not relate back to the filing of the original petition. Because at the time of hearing on objections Jiminez had been withdrawn, respondent asked the Honorable William B. Shubb to rule on

both the limitations question and the merits of Claim 1. Because Claim 1 had never been the subject of a merits determination by the undersigned, the case was referred back to the undersigned for a merits determination on Claim 1.

Soon after the remand, the United States Supreme Court determined, as had the withdrawn Jiminez case, that the pendency of a federal petition did not statutorily toll the AEDPA limitations period. Duncan v. Walker, 533 U.S. 167, 121 S. Ct. 2120 (2001). Jiminez was reinstated (276 F.3d 478 (9th Cir. 2001)). Because the entire rationale for the reference to the undersigned had been obviated by the Supreme Court decision, the undersigned asked the parties to give their views on whether the merits of Claim 1 still required a decision. Petitioner believed that respondent had "waived" the right to rely on the AEDPA limitations and thus, a merits decision was necessary; respondent believed that no merits decision was necessary.

The undersigned concludes that because the limitations

issue is so clearly decided in favor of respondent, and because constitutional issues should be avoided if there is another way to decide the case, no decision on the merits should be made.

Discussion

If the undersigned gleaned a directive from the district judge to render a decision on the merits, "no matter what," that is what the undersigned would perform. However, the district judge's comments and referral are not understood by the undersigned in such a fashion. It appears to the undersigned that if the Jiminez case had not been withdrawn, the district judge would have finally adjudicated the limitations issue. The parties and the court understood that the identical limitations issue was pending before the Supreme Court, but the date and outcome of that decision were uncertain. It made sense in the circumstances to finally adjudicate this case on the merits as well as on the procedural grounds rather than stall the disposition of the case. However, when the Supreme Court ruled fairly quickly after the remand

to the undersigned, those circumstances changed again.

One might question what is the harm in adjudicating the merits at this time. However, that question has been answered by innumerable courts which find harm in adjudicating issues of constitutional significance in the absence of a required need to do so. See Parents Involved in Community Schools v. Seattle School District, 285 F.3d 1236, 1252 (9th Cir. 2002) (looking to state law for rule of decision to avoid the constitutional issue). Petitioner's involuntary statement issue is such a question. Thus, the undersigned only reiterates below the limitations aspects of the disputed claim.

In outline form, the pertinent dates are as follows:

1. Petitioner's conviction is final - August 12, 1997 (three months after the state supreme court petition for review was denied)

2. Federal Petition (raising only Claim 2) filed - May 8, 1998

3. Counsel appointed for federal petition - May 29, 1998

4. AEDPA limitations expires - August 12, 1998

5. Amended Petition filed on January 28, 1999[1/]

6. Habeas petition filed with state supreme court - February 2, 1999

7. Exhaustion motion vacated; respondent answered on September 29, 1999

8. Traverse filed January 21, 2000.

No one contends that the limitations period expiration is incorrectly calculated, or that the belated state petition, belated because it was filed after the limitations period had expired, somehow retroactively tolled the limitations period. And, for the reasons discussed in the initial Findings, and summarized below, equitable tolling is not possible under the facts. The key issue involves application of the relation back

---

1. Petitioner filed the amended petition with unexhausted Claim 1 prior to the time it had been placed before the state supreme court. Nevertheless, when the state supreme court issued its ruling on the claim prior to the time this court heard the exhaustion motion, the exhaustion issue was mooted.

doctrine of Fed. R. Civ. P. 15(c), a doctrine universally held to be applicable to habeas corpus actions. Anthony v. Cambra, 236 F.3d 568, 574 (9th Cir.2000).

All circuits to rule on the issue have held that new claims, pled for the first time in an amended petition, not arising from the same core of operative facts as the claims timely pled, do not relate back, and are AEDPA barred. United States v. Hicks, 283 F.3d 380 (D.C. Cir. 2002) (Apprendi claim did not relate back to original petition alleging a due process witness issue)[2/]; Dean v. United States, 278 F.3d 1218 (11th Cir. 2002) ("Congress did not intend Rule 15(c) to be so broad as to allow an amended pleading to add an entirely new claim based on a different set of facts"); Newell v. Hanks, 283 F.3d 827 (7th Cir. 2002) (stating the rule that no relation back can occur in the absence of a new claim based on the same core of facts advanced in the initial petition, but finding the amended petition nearly identical to

---

2. For AEDPA limitations purposes, the relation back doctrine applies equally to § 2254 and § 2255 petitions.

the initial petition); United States v. Pittman, 209 F.3d 3 14 (4th Cir. 2000) (claims do not relate back simply because petitioner is attacking the same trial and sentencing); United States v. Craycraft, 167 F.3d 451 (8th Cir. 1999) (additional theory of ineffective assistance barred); United States v. Duffus, 174 F.3d 333 (3rd Cir. 1999) (same). See also McClain v. Hill, 52 F. Supp.2d 1133, 1144 (C.D.Ca1. 1999).

As previously discussed in the Findings, Anthony v. Cambra is not to the contrary in that the claim sought to be barred in that case had been raised in the initial federal petition which had been erroneously dismissed thus satisfying the notice provisions of Rule 15(c). No such thing happened here.

The court cannot find that an involuntary statement claim whose genesis is based on petitioner's pre-trial interrogation by the police derives from the same core of facts as the third party videotape Confrontation Clause issue. Not even the same constitutional amendment is in dispute for the

underlying events. Obviously, the theories and facts of the claims are distinct.

Petitioner urges that respondent waived the statute of limitations defense before the district judge, not by directly expressing a waiver, but by his actions in requesting a ruling on the merits. Petitioner's waiver theory is not supported by law. That is, a party does not waive a procedural defense in habeas corpus by seeking an alternative ruling on the merits. Cf. Harris v. Reed, 489 U.S. 255, 264 (n.10), 109 S. Ct. 1038, 1044 (1989) (procedural default ruling may be accompanied by an alternative ruling on the merits). Moreover, the unique circumstances present when the alternative ruling was requested, i.e., the ambiguity of the procedural defense occasioned by the then withdrawn Ninth Circuit case, indicate that no waiver was intended when the Deputy Attorney General requested that the court rule on the merits as well. The fact that the district judge would not rule on the merits without a recommendation from the magistrate judge does not

bespeak the deputy's state of mind vis-a-vis waiver. It bespeaks the knowledge that the deputy really had no choice in the matter once the district judge discussed the procedure to be followed.

Equitable tolling cannot be permitted here because, as set forth in the Findings, petitioner's non-represented status (after his state conviction became final, but before federal habeas proceedings), and his general ignorance of the law, cannot justify equitable tolling. Finally, petitioner's belated, involuntary statement claim does not implicate actual innocence.

Conclusion

Accordingly, the undersigned recommends that Claim 1 be dismissed as time barred. No decision on the merits should be made. Claim 2 is re-submitted to the district court with a recommended denial on the same basis as set forth in the initial Findings and Recommendations.

These findings and recommendations are submitted to

the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections shall be served and filed within ten days after service of the objections. The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

DATED: May 14, 2002.

/s/
UNITED STATES MAGISTRATE JUDGE

GGH:gh:035
felix828.fr

United States District Court
for the
Eastern District of California
May 14, 2002

** CERTIFICATE OF SERVICE **

Felix

v.

Warden

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Eastern District of California.

That on May 14, 2002, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office, or, pursuant to prior authorization by counsel, via facsimile.

David M Porter
Federal Defender
801 K Street
Suite 1024
Sacramento, CA 95814

SH/WBS

VC/GGH

[Cert. of Service cont'd]

Mathew Chan
Attorney General's Office
PO Box 944255
1300 I Street
Suite 125
Sacramento, CA 94244-2550

Jack L. Wagner, Clerk

By: /s/
Deputy Clerk

APPENDIX E

NOT TO BE PUBLISHED

COPY

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

FILED
(Sacramento) Feb 25 1997
COURT OF APPEAL THIRD DISTRICT
---- ROBERT L. LISTON, Clerk
By_____ Deputy

THE PEOPLE Plaintiff and Respondent, v. MARIO LAWSON et al. Defendants and Appellants.	C021597 (Super. Ct. No. 93F09225)

In a joint trial, a jury convicted defendants Mario Lawson and Jacoby Felix of first degree murder (Pen. Code, § 187 [all further unspecified statutory references are to this code]) with special circumstances, i.e., murder in the course of a robbery (§ 190.3, subd. (a)(17), as well as second degree robbery (§ 211). The jury further found that each defendant was armed with a firearm during the commission of the offense (§ 12022, subd. (a))..

On appeal from a judgment of life without the possibility of parole, defendants claim the court erred (1) by failing to give former CALJIC No. 311.1, (2) by denying their right to confrontation and cross-examination in admitting the out-of-court statement of a third-party witness, and (3) in instructing the jury pursuant to CALJIC No. 2.90. They also challenge the sufficiency of the evidence that they were "major participants " in the robbery as defined in section 190.2, subdivision (d). We affirm.

BACKGROUND

Around 11 p.m. o the night of September 21, 1993, Lawrence Gallow and his girlfriend Paula were driving in their automobile when his car stalled near the corner of Eighth Avenue and San Jose Way in Sacramento. After ascertaining that the car was out of gas, Gallow went across the street to ask a man who was smoking a cigarette if he could give them a lift to the gas station. The man, later identified as Richard Harper, agreed.

The three of them walked over to Harper's car and Paula was just about to get in, when a man wearing a hood and a red rag over his face approached and ordered them at gunpoint to "give up the car." Gallow told Paula to "run " and fled himself, taking cover behind his own car. From there, he observed two more men, also wearing hoods on their heads and rags over their faces, approach the scene. One man, who appeared to have a handgun, walked toward Harper's car, while the third man, who was holding a big military-style weapon, stood in the middle of the intersection.

Gallow took off running and was closely pursued by the man with the big gun. He jumped over a fence and through some yards and was turning a corner when the pursuer fired at least one shot at him. He ultimately evaded his assailant and found his way home safely.

Harper also fled on foot but was not so lucky. The other robbers gave chase and shot at him several times. He was found dead in a field not far from his car, with a bullet in the

back of his head.

After shooting Harper, the two robbers entered his car and drove away with the headlights turned off. That night, Harper's car was seen puling up in the vicinity of defendant Felix's house at 11th Avenue and Santa Cruz Way, followed five to ten minutes later by Felix's green Caprice. Three or four men got out of the Caprice and stood around talking while the passenger door to Harper's car remained open. Harper's car was discovered by police the next morning at the same location with a broken dashboard and wires hanging down from the steering wheel. A palm print and fingerprint belonging to defendant Lawson were recovered from the back of Harper's car.

A month later Nathan Potts, who had been arrested for armed robbery, negotiated a deal with detectives to provide information and testimony about the Harper murder in exchange for a promise of no prison time. Potts testified that the time of the murder he was a good friend of Lawson's,

who lived upstairs from him, and was also acquainted with Felix. Early one morning, shortly after the murder, Potts was awakened by loud music playing outside on the street. He went outside and saw Felix and Lawson standing around their cars. Felix was working on his car, hooking up "some music [amplifiers, speakers, etc]," with Lawson's assistance.[1/] Lawson asked Potts if he had heard about the killing on Eighth Avenue. When Potts replied affirmatively, Lawson admitted he had been involved. He said he had chased someone with a gun and fired his weapon, but was unsure if he hit anyone. Felix said hat a woman might have seen him and he was "going back to smoke [shoot] her."

Some time later, Felix, who appeared very upset, told Potts that people were trying to implicate him in the murder; that he "already had his story straight;" and that if the police contacted him he would have an alibi.

---

1. Potts testified that the men were hooking up 12-inch speakers to Felix's car. Another witness, Kenneth Williams, told police he was both defendants taking a pair of 12-inch speakers out of Harper's car.

When Felix and Lawson were interviewed by police, each gave false and/or contradictory statements concerning their activities on the night of the murder.

The centerpiece f the prosecution's case was an interview given by Kenneth Williams to Police Detective Toni Winfield, who was investigating Harper's murder. The interview was transcribed and videotaped, and portions of the tape were played during Williams testimony.

Williams, who was in custody at the time on a minor unrelated matter, appeared nervous and upset, crying at the beginning of the interview because "I don't want to snitch on my homies [best friend]." He told Winfield that just before the robbery he overheard Felix, Lawson and a third man, Ellis Curtis,[2] planning to "jack the dude " who lied around the corner for some "weed," meaning to rob Harper to obtain

2. Although the information is not readily available in the record, the Attorney General represents, without contradiction, that Curtis was convicted in a prior joint trial with Lawson and that the trial below was a retrial of Lawson, the first jury having deadlocked over Lawson's guilt.

marijuana.[3] Felix had an automatic weapon and Curtis had a .38 revolver.

Williams saw the three men go the around the corner and about two minutes later he heard six or seven shots ring out. He then observed Curtis and Felix hop into Harper's car and drive off. Williams saw the trio a short time later going through Harper's car. Williams asked Felix whether he shot Harper, and Felix replied, "I think so."

At trial, Williams consistently denied any memory of the interview with Detective Winfield, despite being shown videotape excerpts in front of the jury.

Defense

The defense presented testimony that Nathan Potts was an unreliable and untrustworthy witness. Lawson did not testify. Felix testifying in his own defense, said he was in the vicinity on the night of the murder and heard gunshots, but insisted he did not participate. He claimed he saw two men exit Harper's

3. Harper was known in the neighborhood was a marijuana dealer.

car shortly after the shots were fired, and gave then a ride, in exchange for which they gave him two window speakers from the car.

DISCUSSION

I

Because Williams, at trial, claimed total memory loss with respect to the statements incriminating them in his interview with Detective Winfield, defendants maintain the trial court should have instructed the jury with former CALJIC No. 3.11.1 and the rule in *People v. Gould* (1960) 54 Cal.2d 621, that a witness's out-of-court identification "that cannot be confirmed by an identification [of the defendant] at the trial is insufficient to sustain a conviction in the absence of other evidence to connect the defendant with the crime." (*Id.* at p. 631.)

The argument has no merit. In *People v. Cuevas* (1995) 12 Cal4th 252 the Supreme Court overruled *Gould's* holding that a repudiated extrajudicial identification of the defendant is

insufficient by itself to sustain a conviction Instead, the court held the sufficiency of the out-of-court statement should be determined by applying the substantial evidence standard of *People v. Johnson* (1980) 26 Cal.3d 557, 578. (*Cuevas, supra*, at pp. 257, 271-272, 277.) More importantly, the court expressly disapproved both the holding of *People v. Marquez* (1993) 14 Cal.App.4th 115, 121 that the trial court must instruct the jury sua sponte on the *Gould* corroboration requirement *and* CALJIC No. 3.11.1 (5th ed. 1995 supp.), which embodies the *Marquez* holding. (*Cuevas, supra*, at p. 275, fn. 5.)

While tacitly admitting *Cuevas* defeats their argument, defendant assert it would violate their constitutional rights to apply *Cuevas* retroactively so as to apply to crimes committed, as this one was, before *Cuevas* became final.

The California Supreme Court has rejected this motion in *Cuevas* itself, noting "there is no due process obstacle to retroactive application of our decision." (*Cuevas, supra*, 12

Cal.4th at p. 275.)

Even if we agreed with defendants' assertion that the court erred in failing to give a *Gould* instruction, any error must be considered harmless because Williams's out-of-court statements *were* substantially corroborated by (1) the damaging testimony of Nathan Potts,[4] (2) Lawson's fingerprints on Harper's car, (3) Felix's possession of the victim's car stereo components, and (4) defendants' false statements to the police concerning their comings and goings on the night of the murder.

There was no instructional error.

II

Defendants argue that the court committed error of constitutional magnitude in admitting Williams's statement to Detective Winfield as "prior inconsistent statements " because Williams, in his trial testimony, claimed to have no

4. Potts testified that both defendants admitted their involvement in the crime. That he may have been an unreliable witness was a question for the jury to decide, and defendants' belated attack on his credibility is not properly addressed to this court.

memory of the interview. The gist of the argument is that Williams's failure to recall *any* of the statements effectively denied them the right to cross-examine him, thus bringing the case within the exception of *People v. Green* (1971) 3 Cal.3d 981, 990.

The argument presupposes that Williams's lack of memory was genuine and not feigned, for if it was feigned, the law is well established that the interview statements would be admissible. "Inconsistency in effect, rather than contradiction in express terms, is the test for admitting a witness'[s] prior statement [citation], and the same principle governs the case of the forgetful witness." (*People v. Green*, *supra*, 3 Cal.3d at p. 988.) *When a witness's claim of lack of memory amounts to deliberate evasion, inconsistency is implied.* (*Id.* at pp. 988-989.) "As long as there is a reasonable basis in the record for concluding that the witness's 'I don't' remember' statements are evasive and untruthful, admission of his or her prior statements is proper." (*People v. Johnson* (1992) 3

Cal.4th 1183, 1219-1220.)

Defendants did not request that court make a finding that Williams was being truthful in is claimed memory loss, rendering him unavailable as a witness. (Evid. Code, § 240; see *People v. Price* (1991) 1 Cal.4th 324, 413.) Since there was no request for a judicial determination of this preliminary fact, we imply a finding Williams was not unavailable as a witness from the court's admission of his testimony. (Evid. Code, § 402, subd. (c).)

The trial courts comments in response to defendants' motion to strike Williams's testimony show it considered his "memory loss" to be disingenuous.[5] This finding has ample support in the record. Numerous times, when asked if he remembered the statements being shown in the videotape,

---

5. The court made the following pertinent comments. "Hostile witnesses are not unknown in the law. When they appear, they have to be dealt with. [¶] There were transcripts of his prior testimony available to impeach him. There were statements that he had made to the detectives which were available to both the prosecution and the defense to impeach him. [¶] *His failure of recollection was obviously contrived*, which is why the statements that he made on those precious occasions are admissible as evidence, available for consideration by the jury." (Emphasis added.)

Williams, rather than claiming memory loss, said "I don't know." When asked why he was telling the jury that he did not remember anything, Williams replied, "Because I don't feel like being here period." Significantly, one of the few admission Williams did make during his trial testimony was that he was crying during the interview because he did not want to "tell on them [defendants]."

Substantial evidence supports the court's determination that Williams was an evasive and hostile prosecution witness. His statements at the Winfield interview were therefore properly admitted to impeach him. (*Johnson, supra*, 3 Cal.4th at pp. 1219-1220.)

III

Each defendant challenges the jury's findings that he was a "major participant " in the robbery and murder of Harper, within the meaning of section 190.2, subdivision (d). This subdivision provides that a finding of special circumstances applies to "every person, *not the actual killer*, who, with

reckless indifference to human life *and as a major participant*, aids, abets, counsels, commands, induces, solicits, requests, or assists in the commission of a felony [including robbery]." (Italics added.)

The standard of review is clear. "When the sufficiency of evidence is attacked, the appellate court must view the evidence in the light most favorable to the judgment, presuming the existence of every fact the trier of fact could reasonably deduce from the evidence. Even if the evidence might reasonably be reconciled with the defendant's innocence, the appellate court may not substitute its judgment for the trier's. The test on appeal is whether any rational trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.]" (*People v. Bustos* (1994) 23 Cal.App.4th 1747, 1754.)

We disagree with Lawson's threshold premise that a "major participant " must be either a "triggerman " or "ringleader/" Such a proposition is irreconcilable with the

language of the statute permitting special circumstance liability to be imposed upon one who does not personally do the actual killing but nevertheless "aids, abets. counsels, commands, . . . or assists " the underlying crime.

We further find the evidence sufficient to support a finding that each defendant was a major participant within the meaning of section 190.2, subdivision (d). Lawson and Felix were both present with Curtis when the three of them discussed and planned the robbery of Harper, a discussion during which Felix and Curtis had guns at hand. All three assailants wore clothing designed to cover their faces and conceal their identities. There was evidence from which the jury could conclude Felix was indeed the triggerman who pursued and shot Harper, then left him to die as he drove off with Curtis in the victim's car, while Lawson chased Gallow through several backyards and shot at him in an apparent effort to eliminate the principal eyewitness to the crime.

We have no trouble upholding the jury finding that both

defendants were "major participants" who, with reckless indifference for human life, aided, abetted, and assisted in the robbery of Harper. (Compare *People v. Bustos*, *supra*, 23 Cal.App.4th at pp. 1754-1755; *People v. Mora* (1995) 39 Cal.App.4th 607, 618-619.)

IV

Defendant launches a constitutional attack on the reasonable doubt instruction given to the jury, revised CALJIC No. 2.90, on the ground that it impermissibly lightened the prosecution's burden of proof. This argument has been raised and rejected in numerous recent appellate decisions (e.g., *People v. Barillas* (1996) 49 Cal.App.4th 1012, 1022; *People v. Tran* (1996) 47 Cal.App.4th 253, 262-263; *People v. Carroll* (1996) 47 Cal.App.4th 892, 895-896; *People v. Light* (1996) 43 Cal.App.4th 1073, 1077-1079), and thus bears no further discussion.

DISPOSITION

The judgment is affirmed.

CALLAHAN, J.

We concur:

PUGLIA, P.J.

SPARKS, J.

APPENDIX F

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	
Plaintiff and Respondent,	C021597
MARIO LAWSON et al.,	Sacramento No. 93F09225
Defendants and Appellants.	

PETITION FOR REVIEW
(FELIX)

Mark D. Greenberg
Attorney at Law
State Bar No. 99726
484 Lake Park Avenue, No. 429
Oakland, CA 94610
(510) 452-3126

Attorney for Appellant

Third Appellate District No. C021597
S060031

IN THE SUPREME COURT OF CALIFORNIA

THE PEOPLE, Respondent

v.

MARIO LAWSON et al., Appellants

Appellants' petition for review DENIED.

SUPREME COURT
FILED
MAY 14 1997
ROBERT WANDRUFF, CLERK
/s/
DEPUTY

/s/
Chief Justice

APPENDIX G

Jacoby Lee Felix J-72455
In Pro Per
D-3 112
California State Prison - Salinas Valley
P.O. Box 1060
Soledad, CA 93960-1060

Attorney for: Jacoby Felix, In Pro Per

FILED
May - 8 1998
Clerk, U.S. District Court
Eastern District of California
By_____
DEPUTY CLERK

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

JACOBY LEE FELIX,	)	
	)	
PETITIONER	)	Case No.
	)	CIV S-98-0828 WBS GGH P
vs .	)	
	)	
WARDEN, California State Prison	)	PETITION FOR WRIT OF
	)	HABEAS CORPUS
at SALINAS VALLEY DOES 1-10,	)	
	)	
RESPONDENTS		

PETITION FOR WRIT OF HABEAS CORPUS

on DIRECT APPEAL FROM A

CALIFORNIA SUPREME COURT DECISION

This petition concern a conviction. My name **is Jacoby Lee Felix**, California Department of Corrections, **Number J 72455**. I was tried with co-defendant Mario Lawson.

JURISDICTION

I was convicted of the following offenses and enhancements with: First Degree Murder (Penal Code 187); Robbery (211 Penal Code) and special circumstance allegation (190.2 (a) Penal Code, supd. (a) (17) connected to the murder charge and Use of Firearm in commission of a crime (Penal Code 12022 (a)).

Sentencing Court: **Sacramento County Superior Court,** Los Angeles,

Honorable Jack Spaunor.

Case Number: SC No. 93F09225

DATE OF VERDICT: July 6, 1995 Verdict: Guilty of First Degree Murder with all special circumstances

SENTENCED: AUGUST 25, 1995 TERM: Life without possibility of Parole. Notice of Appeal was timely filed.

Yes, I am PRESENTLY in custody at the Calipatria State Prison, Salinas Valley, Soledad, California 93960-1060.

NO PRIOR POST CONVICTION RELIEF HAS BEEN

SOUGHT OTHER THAN THIS DIRECT APPEAL FROM THE DECISION OF THE CALIFORNIA SUPREME COURT.

APPEAL ACTIVITIES

YES, I did take an appeal from my conviction to the following courts :

Court of Appeal of the State of California, Third Appellate District.

JUDGMENT AFFIRMED February 25, 1997.

Supreme Court of the State of California April 1, 1997 Petition for Review **Denied May 13, 1997**

The Grounds and issues presented in this Federal Habeas Corpus are the same as those presented to the state courts thus exhausting state remedies on ALL issues as required by law.

The only opinion rendered in the appeal process thus far was the UNPUBLISHED DECISION OF THE COURT OF APPEAL (supra) Refer to Appendix B for text of that opinion.

OTHER POST-CONVICTION REVIEWS

THIS PETITIONER has NOT filed any other post-conviction reviews other than those mentioned previously in this Petition which is a continuation of the DIRECT APPEAL process after exhausting all state remedies. Since the Petitioner **is still within the ONE YEAR statutory period to proceed with his DIRECT APPEAL,** it is not appropriate for Petitioner to initiate any new post-conviction proceedings until all level have been exhausted on the DIRECT APPEAL ISSUES.

There are NO other post-conviction reviews pending in ANY court at this time.

TRIAL INFORMATION

The Petitioner did have the following state court proceedings: Arraignment; Preliminary Hearing. There were no motions to suppress filed. **There was a motion for a new trial that was denied. There was also a motion for bifurcation of the trials of the co-defendants which was**

also denied. Petitioner did not enter a guilty plea in this case. The Petitioner had Jury Trial. **The Petitioner did testify in his trial.**

GROUNDS FOR RELIEF FROM CONVICTION

For the purpose of this Petition is advancing the same issues as presented in state court to exhaust his review remedies on those issues. The petitioner respectfully direct the court to **Appendix A** for the Issues on Review, **Submitted to the California Supreme Court Supporting Facts (Arguments), Points and Authorities** as presented:

However, in summary the grounds are:

GROUND ONE: Failure to instruct the Jurors on corroboration of repudiated extrajudicial statement, which has been overruled, was error, and to deny petitioner relief based on the judicial abrogation of the rule constitute a violation of due process.

GROUND TWO: Even though Williams' extrajudicial statement was admitted as a prior inconsistent statement, this evidence nonetheless violated the Sixth Amendment right to confront hostile witness.

GROUND THREE: Evidence was insufficient to establish that appellant was a "major participant."

ALL OF THE ABOVE GROUNDS WERE PRESENTED IN THE STATE COURT.

Supporting Cases and Authorities: Please refer to Appendix A and B.

ATTORNEY INFORMATION

Trial attorney, arraignment and preliminary hearing, Sentencing: Mark Millard, Esq., Alternative Defense Counsel, Sacramento, California.

Appeal Attorney: Mark D. Greenberg, Esq., 484 Lake Park Avenue, No. 129, Oakland, California, 94610.

The Petitioner's attorney was appointed by the State. The petitioner is not alleging that his attorney was ineffective in this petition.

The petitioner is In Propria Persona in this Petition.

The Petitioner prays that the court **appoint an attorney to represent him before this court** should find merit with his issues and subsequent appearances or filings become necessary before this court.

Furthermore, the petitioner prays that the court grant petitioner relief to which he may be entitled in this proceeding.

Executed at Calipatria State Prison, California.

Dated: 5-4-98

/s/
Jacoby Lee Felix J-72455

FORMA PAUPERIS AFFIDAVIT

I Hereby apply for leave to proceed with this Habeas corpus petition without prepayment of fees or costs or security therefor. In Support of my application, I state that the following facts are true:

(1) I am the petitioner in said petition, and I believe I am entitled to redress.

(2) I am unable to pay the costs of said action or give security because: I am an indigent inmate in a California State Prison without a source of income.

/s/
Jacoby Lee Felix J-72455

STATE OF CALIFORNIA)

COUNTY OF MONTEREY)

I declare under penalty of perjury that the foregoing is true and correct.

[Affidavit cont'd]

Signed on 4 May 1998.

/s/
JACOBY LEE FELIX J-72455

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA COUNTY OF SACRAMENTO:

I am a resident of the City of Sacramento, in Sacramento County, and I affirm that on 5/8/98 I served the within Writ of Habeas Corpus on the below listed parties by placing a true copy in a sealed envelope with postage thereon fully prepaid in the United States mail at Sacramento, California, addressed as follows:

UNITED STATES DISTRICT COURT, Eastern District,

650 Capitol Mall, Sacramento, CA 95814

Clerk, California State Supreme Court

303 Second Street, 8th Floor, San Francisco, CA 94107

[Proof of Service by Mail cont'd]

Warden, California State Prison at Salinas Valley

P.O. Box 1060, Soledad, CA 93960-1060

Daniel Lungren, Attorney General, State of California

P.O. Box 903447, Sacramento, CA 94203

Clerk of the Sacramento County for delivery to: Hon. Jack V. Sapunor, Judge Department 6, 720 9th Street, Room 102

Sacramento, CA 95814

District Attorney, Sacramento County, 901 G Street,

Sacramento CA 95814

CALIFORNIA APPELLATE PROJECT, 2407 J Street,

#301, Sacramento, CA 95816

PROOF OF SERVICE CONTINUED

I declare that under penalty of perjury under the laws State of California that the foregoing is true and correct.

Executed on 5/8/98 at Sacramento, California.

/s/
Cynthia McDowell
7355 Willowwick Way
Sacramento, CA 95822

APPENDIX H

APPEAL 9THCIR

DISTRICT OF CALIFORNIA
EASTERN DISTRICT OF CALIFORNIA (Sacramento)

CIVIL DOCKET FOR CASE #: 98-CV-828

Felix v. Warden, et al — Filed: 05/08/98
Assigned to: Judge Morrison C England, Jr
Referred to: Magistrate Judge Gregory G Hollows
Demand: $0,000 — Nature of Suit: 530
Lead Docket: None — Jurisdiction: Federal Question
Dkt# in other court: None
Cause: 28:2254 Petition for Writ of Habeas Corpus (State)

JACOBY LEE FELIX
petitioner

Ann Catherine McClintock
[term 09/17/98]
1 916 498 6656
[COR LD NTC pda]
Federal Defender
801 K Street
Suite 1024
Sacramento, CA 95814
916-498-5700

David M Porter
1 916 498 6656
[COR LD NTC]
Federal Defender
801 K Street
Suite 1024
Sacramento, CA 95814
916-498-5700

v.

CA STATE PRISON, Warden at Salinas Valley
respondent
[term 02-02-99]

Mathew Chan
[term 02-01-99]
[COR LD NTC]
Attorney General's Office
PO Box 944255
1300 I Street
Suite 125
Sacramento, CA 94244-2550
916-445-9555

ATTORNEY GENERAL FOR THE STATE OF CALIFORNIA
respondent

Mathew Chan
(See above)
[COR LD NTC]

Docket as of August 16, 2002 12:56 pm Page 1

APPEAL
Proceedings include all events. 9THCIR
2:98cv828 Felix v. Warden, et al

DENISE MAYLE, Warden
respondent

Mathew Chan
(See above)
[COR LD NTC]

Docket as of August 16, 2002 12:56 pm Page 2

APPEAL
Proceedings include all events. 9THCIR
2:98cv828 Felix v. Warden, et al

5/8/98	1	PETITION FOR WRIT OF HABEAS CORPUS fee status paid receipt #185253, assigned to Chief Judge William B. Shubb referred to Magistrate Gregory G Hollows (ljr) [Entry date 05/11/98] [Edit date 05/11/98]
5/29/98	2	ORDER by Magistrate Judge Gregory G Hollows ORDERING the Federal Defender appointed as counsel, counsel to contact clerks office to make arrangements to copy file; pretrial conference set for 10:00 6/25/98; parties to file status reports 14 days before the pretrial conference, failure to file timely may result in sanctions; the Clerk to serve Robert Anderson with copy of application and this order (cc: all counsel) (rp) [Entry date 05/29/98]

6/8/98	3	NOTICE by respondent CA State Prison of related case(s) CIV S-98-667 DFL JFM P (gm) [Entry date 06/11/98]
6/9/98	--	RESERVICE of DOCUMENT(S) Order [2-11, [2-21 addressed to the federal defender on behalf of petitioner Jacoby Lee Felix (cc: all counsel) (gk) [Entry date 06/09/98]
6/10/98	4	STATUS REPORT by petitioner Jacoby Lee Felix (cld) [Entry date 06/11/98]
6/10/98	5	STATUS REPORT by respondents CA State Prison and Attorney General CA (cld) [Entry date 06/11/98]
6/26/98	6	MINUTES of Proceedings before Magistrate Judge Gregory G Hollows pretrial conference held on 6/26/98; after a lenghy discussion the court stated it will issue an order deciding what to do because, there has been a notice of related cases filed (gk) [Entry date 06/26/98]
9/15/98	7	ORDER by Magistrate Judge Gregory G Hollows ORDERING petitioner to file an amended complaint within 30 days; respondent to file an answer or motion to dismiss 30 days thereafter, with petitioner's traverse due 30 days from that date; petitioner to follow Local Rules in filing an opposition to any motion to dismiss (cc: all counsel) (rp) [Entry date 09/15/98]
9/17/98	8	LETTER to court from counsel for petitioner Jacoby Lee Felix stating case has been reassigned to FD David Porter (kh) [Entry date

09/21/98]

10/15/98 -- LODGED request for extension of time for filing of amended petition and proposed order thereon by petitioner Jacoby Lee Felix (rp) [Entry date 10/16/98]

10/22/98 10 LETTER to court from counsel for respondents re participation in petitioner's request for extension of time (rp) [Entry date 10/23/98]

APPEAL

Proceedings include all events. 9THCIR
2:98cv828 Felix v. Warden, et al

10/23/98 9 ORDER by Magistrate Judge Gregory G Hollows ORDERING lodged request for extension of time GRANTED; petitioner's amended petition for a writ of habeas relief to be filed by 11.30.98 (cc: all counsel) (rp) [Entry date 10/23/98]

11/6/98 11 LETTER to court from counsel for petitioner regarding M Chan's letter to the Court dated 1/22/98 [10-1] (rb) [Entry date 11/09/98]

11/30/98 -- LODGED request for extension of time for filing of amended petition or supplemental memorandum of points and authorities by petitioner Jacoby Lee Felix (rp) [Entry date 12/01/98]

12/10/98 12 ORDER by Magistrate Judge Gregory G Hollows ORDERING request for an extension of time for filing of amended petition or supplemental memorandum of points and authorites is GRANTED; petition due 1/14/99 (cc: all counsel) (rb) [Entry date 12/10/98]

1/14/99 -- LODGED request for extension of time for filing of amended petition; order by counsel for petitioner Jacoby Lee Felix (rb) [Entry date 01/19/99]

1/28/99 13 ORDER by Magistrate Judge Gregory G Hollows ORDERING lodged request GRANTED; petitioner's amended petition to be filed by 1.28.99 (cc: all counsel) (rp) [Entry date 01/28/99]

1/28/99 14 AMENDED petition for writ of habeas corpus by petitioner Jacoby Lee Felix [1-11 (dd) [Entry date 01/29/99]

2/1/99 15 AMENDED [1-1] PETITION FOR WRIT OF HABEAS CORPUS terminates respondent CA State Prison adding respondent Denise Mayle (chl) [Entry date 02/02/99]

2/25/99 16 NOTICE by respondent of motion to dismiss petition for writ of habeas corpus (rb) [Entry date 02/26/99]

2/25/99 17 MOTION to dismiss case by respondents CA State Prison, Attorney General CA, and Denise Mayle Motion Hearing Set for 10:00 4/29/99 (rb) [Entry date 02/26/99]

2/25/99 18 NOTICE by respondent of motion to dismiss party Attorney General (rb) [Entry date 02/26/99]

2/25/99 19 MOTION to dismiss party by respondent Motion Hearing Set for 10:00 4/29/99 (rb) [Entry date 02/26/99]

4/12/99 -- LODGED unopposed request by petitioner Jacoby Lee Felix to continue hearing date currently set for 4/29/99 (rp) [Entry date 04/13/99]

4/22/99 -- LODGED unopposed request to continue hearing date currently set for 5/6/99; proposed order by counsel for petitioner Jacoby Lee Felix (ac) [Entry date 04/23/99]

4/23/99 20 ORDER by Magistrate Judge Gregory G Hollows ORDERING lodged unopposed request GRANTED, motion to dismiss party by respondent [19-1] HEARING RESET FOR 10:00 5/6/99, motion to dismiss case by respondents CA State Prison, Attorney General CA, and Denise Mayle [17-1] HEARING RESET FOR 10:00 5/6/99 (cc: all counsel) (rp) [Entry date 04/23/99]

4/27/99 21 ORDER by Magistrate Judge Gregory G

Hollows ORDERING lodged request GRANTED motion to dismiss party by respondent [19-1] HEARING RESET FOR 10:00 5/20/99, motion to dismiss case by respondents CA State Prison, Attorney General CA, and Denise Mayle [17-1] HEARING RESET FOR 10:00 5/20/99 (cc: all counsel) (rp) [Entry date 04/27/99]

5/6/99 22 OPPOSITION by petitioner Jacoby Lee Felix to motions to dismiss [19-1], [17-1] (rp) [Entry date 05/07/99]

5/14/99 -- LODGED unopposed request to continue hearing date currently set for 5/20/99; lodged order by petitioner Jacoby Lee Felix (ac) [Entry date 05/17/99]

5/18/99 23 ORDER by Magistrate Judge Gregory G Hollows ORDERING lodged request GRANTED; motion to dismiss party by respondent [19-1] HEARING RESET FOR 10:00 6/17/99; motion to dismiss case by respondents CA State Prison, Attorney General CA, and Denise Mayle [17-1] HEARING RESET FOR 10:00 6/17/99 (cc: all counsel) (rp) [Entry date 05/18/99]

6/15/99 24 REQUEST by respondent to vacate hearing on motion to dismiss (chl) [Entry date 06/16/99] [Edit date 06/16/99]

6/24/99 25 ORDER by Magistrate Judge Gregory G Hollows ORDERING request to vacate the motion to dismiss hearing [24-1] GRANTED; motion to dismiss party by respondent

Attorney General [19-1] GRANTED; respondents request for extension of time to 9/15/99 to file an answer GRANTED (cc: all counsel) (rp) [Entry date 06/24/99]

9/14/99 -- LODGED request for extension of time to file answer by respondent Denise Mayle (rp) [Entry date 09/15/99]

9/23/99 26 ORDER by Magistrate Judge Gregory G Hollows ORDERING extension of time until 10/15/99 to answer for Denise Mayle; GRANTED; no further extensions (cc: all counsel) (rb) [Entry date 09/23/99]

9/29/99 27 ANSWER by respondent; memorandum of points and authorities in support thereof (rb) [Entry date 09/29/99]

APPEAL

Proceedings include all events. 9THCIR
2:98cv828 Felix v. Warden, et al

9/29/99 28 NOTICE of lodging by respondent of Reporters' transcript on Appeal Volume I, pp 1-297; Vol 11, pp 298-579; Vol 111, pp 580-863; Vol IV, pp 864-1147; Vol V, 1148-1431; Vol VI, pp1432-1569; Clerk's Augmented Transcript on Appeal, Vol I, pp 1-300; Clerk's Transcript on Appeal, pp 581-595 and 700-727 (rb) [Entry date 09/29/99]

11/1/99 -- LODGED Request for additional time to file

traverse by petitioner Jacoby Lee Felix (pp) [Entry date 11/03/99]

11/4/99 29 ORDER by Magistrate Judge Gregory G Hollows ORDERING petitioner's request for additional time until 1/22/00to file traverse GRANTED (cc: all counsel) (rb) [Entry date 11/04/99]

1/21/00 30 TRAVERSE by petitioner (pp) [Entry date 01/24/00]

2/9/01 31 FINDINGS AND RECOMMENDATIONS by Magistrate Judge Gregory G Hollows RECOMMENDING that petitioner's application for writ of habeas corpus be denied; the F&Rs are submitted to the District Judge; objections are due within 20 days; (cc: all counsel) (khl) [Entry date 02/09/01]

2/22/01 -- LODGED Unopposed request to extend time to file objs to F&R; Declaration of counsel; Order thereon by petitioner Jacoby - - - Lee Felix (ea) [Entry date 02/23/01]

3/6/01 32 ORDER by Magistrate Judge Gregory G Hollows ORDERING lodged request for extension of time to file objections to F&Rs is GRANTED; on or before 4/4/01; any reply 10 days thereafter; (cc: all counsel) (khl) [Entry date 03/06/01]

4/4/01 33 OBJECTIONS TO FINDINGS AND RECOMMENDATIONS [31-1] by petitioner Jacoby Lee Felix (ea) [Entry date 04/05/01]

4/16/01	--	LODGED Unopposed Request to extend time to file objections to Findings and Recommendations; Declaration of counsel by respondents (ndd) [Entry date 04/17/01]
4/24/01	34	ORDER by Magistrate Judge Gregory G Hollows ORDERING that respondent is granted extension of time until 5/4/01 to file reply to objections to findings & recommendation order [31-1] (cc: all counsel) (as) [Entry date 04/24/01]
5/1/01	35	REPLY by respondent Denise Mayle to objections to Findings and Recommendations [33-1] (ea) [Entry date 05/02/01]
6/5/01	26	MINUTE ORDER by Courtroom Deputy S. Hoover informing parties that oral argument has been SET in the above-entitled matter for 9:00 06/13/01, before the Honorable William B. Shubb; in-court hearing set for 9:00 6/13/01 (cc: all counsel) (ar) [Entry date 06/06/01]

APPEAL

Proceedings include all events. 9THCIR
2:98cv828 Felix v. Warden, et al

6/13/01	37	MINUTES before Chief Judge William B. Shubb oral argument on petition for writ of habeas corpus hearing held on 6/13/01; Matter referred back to Magistrate Judge; Court to prepare order; C/R Kelly O'Halloran (pb) [Entry date 06/14/01]

6/15/01	38	ORDER by Chief Judge William B. Shubb ORDERING this matter is referred back to the magistrate judge for findings and recommendations on the merits (cc: all counsel) (ds) [Entry date 06/15/01]
7/18/01	39	TRANSCRIPT of 6/13/01 hearing on Section 2254 motion by C/R Kelly O'Halloran (pb) [Entry date 07/19/01]
8/16/01	40	ORDER by Gregory G Hollows Magistrate Judge ORDERING that the parties shall file a response within ten days indicating whether a hearing on the merits is still necessary in light of the most recent Duncan opinion (cc: all counsel) (ak) [Entry date 08/16/01]
8/22/01	41	RESPONSE by respondent to order [40-1] (bd) [Entry date 08/22/01]
8/24/01	--	LODGED order and unopposed request to extend time to file response to court order filed on 08/16/01 by petitioner Jacoby Lee Felix (pw) [Entry date 08/27/01]
8/30/01	42	ORDER by Magistrate Judge Gregory G Hollows ORDERING that the time for petitioner to file his response addressing the Duncan decision shall be extended until 9/6/01 (cc: all counsel) (ljr) [Entry date 08/30/01]
9/5/01	43	RESPONSE by petitioner Jacoby Lee Felix to orders [40-1] and [42-1] (bd) [Entry date 09/06/01]
9/5/01	--	LODGED order re waiving of statute of

limitation defense and issuance of F&Rs as to claim one by petitioner Jacoby Lee Felix (bd) [Entry date 09/06/01]

10/2/01 44 ORDER by Gregory G Hollows Magistrate Judge: ORDERING that the court will take all matters under submission without hearing (cc: all counsel) (ak) [Entry date 10/02/01]

5/14/02 45 FINDINGS AND RECOMMENDATIONS by Gregory G Hollows Magistrate Judge RECOMMENDING that Claim 1 be dismissed as time barred; no decision on the merits should be made; Claim 2 is re-submitted to the district court with a recommended denial on the same basis as set forth in the initial F & R (cc: all counsel) (hk) [Entry date 05/14/02]

6/3/02 46 OBJECTIONS TO FINDINGS AND RECOMMENDATIONS [45 - 1] by petitioner (ak) [Entry date 06/04/02]

6/13/02 47 RESPONSE by respondent to pltfs objections to F&Rs [46-1]

(nac) [Entry date 06/14/02]

7/1/02 48 ORDER by Chief Judge William B. Shubb

ORDERING findings & recommendation order [45-1] ADOPTED in full; Claim 1 is dismissed as time barred; Claim 2 is denied on the same basis as set forth in the initial Findings and Recommendations [1-1] (cc: all counsel) (mdp) [Entry date 07/01/02]

7/29/02 49 NOTICE OF APPEAL by petitioner Jacoby Lee Felix from District Court decision re order [48-1] (fee status NOT PAID) (bd) [Entry date 07/30/02]

8/10/02 50 ORDER by Chief Judge William B. Shubb ORDERING Case REASSIGNED to Judge Morrison C. England Jr NO DDLs VACATED (cc: all counsel) (kb) [Entry date 08/10/02]

8/14/02 51 ORDER by Chief Judge William B Shubb ORDERING re appeal [49-1]; A Certificate of appealability should not issue in this action (cc: all counsel) (lm) [Entry date 08/14/02]

8/14/02 -- LODGED request for reconsideration; application for certificate of appealability and for entry of judgment; exhibit; proposed order; by petitioner (nac) [Entry date 08/15/02]

8/16/02 52 MAILED case information/docket fee payment notice, copy of Notice of Appeal to 9th Circuit Court of Appeals, copy of appeal and docket sheet to all parties (bd) [Entry date 08/16/02]

8/16/02 -- CLERK'S record on appeal transmitted to 9th Circuit: case file 2 volumes, 3 expandos and copy of docket mailed to 9th Circuit regarding appeal [49-1] (bd) [Entry date 08/16/02]

APPENDIX I

QUIN DENVIR, Bar #49374
Federal Defender
DAVID M. PORTER,
Assistant Federal Defender, Bar # 127024
801 K Street, 10th Floor
Sacramento, California 95814
Telephone: (916) 498-5700

Attorneys for Petitioner
JACOBY LEE FELIX

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

JACOBY LEE FELIX, Petitioner, v. DENEICE A. MAYLE, Warden, Respondent, BILL LOCKYER, Attorney General, Additional Respondent.	NO. CIV S 98-828 WBS GGH P AMENDED PETITION FOR WRIT OF HABEAS CORPUS PURSUANT TO 28 U.S.C. § 2254

Petitioner JACOBY LEE FELIX, No. J-72455, is currently confined by the Respondent at the Salinas Valley State Prison, Soledad, California, 93960-1020, in violation of the Constitution of the United States.

1. **Name and location of court which entered the judgment of conviction under attack:** Sacramento County Superior Court, Case No. 93F09225

2. **Date of judgment of conviction:** July 6, 1995

3. **Length of sentence:** Life without possibility of parole

4. **Nature of offense involved (all counts):** One count under California Penal Code § 187(a) (first degree murder with special circumstances) and § 12022.5 (enhancement for use of a weapon); one count under California Penal Code § 211 (second degree robbery) and § 12022.5
5. **What was your plea?** Not guilty on all counts

6. **Kind of trial:** Jury

7. **Did you testify at the trial?** Yes

8. **Did you appeal from the judgment of conviction?** Yes

9. **If you did appeal, answer the following:**
(a) Name of court: California Court of Appeal, Third District
(b) Result: Judgment affirmed
(c) Date of Result and citation, if known: February 25, 1997 (C021597, unpublished)
(d) Grounds raised: (1) People v. Cuevas cannot be applied retroactively to eliminate the court's sua sponte duty to instruct that even if Williams were not an accomplice, his extrajudicial statement required corroboration; (2) admitting the extrajudicial statements of Kenneth Williams violated Appellant's federal and state constitutional rights to confront and cross-examine witnesses; (3) the evidence was insufficient as a matter of law to establish Appellant as a "major participant"; and (4) deletion of the phrase "moral certainty" from CALJIC No. 2.90 renders that instruction unconstitutional.

(e) If you sought review of the decision on appeal by a higher state court, please answer the following:
(1) Name of Court: Supreme Court of California
(2) Result: Petition for review denied
(3) Date of result and citation, if known: May 14, 1997
(4) Grounds raised: (1) Failure to instruct the jurors on corroboration of repudiated extrajudicial statements, which has been overruled, was error, and to deny Appellant relief based on the judicial abrogation of the rule constitutes a violation of due process; (2) even though Williams1 extrajudicial statement was admitted as a prior inconsistent statement, this evidence nonetheless violated the Sixth Amendment right to confront hostile witnesses; and (3) evidence was insufficient to establish that Appellant was a "major participant."

10. **Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this judgment in any court, state or federal?** Yes

11. **If your answer to 10 was "yes," give the following information:**
(a) (1) Name of Court: United States District Court
(2) Nature of Proceeding: Petition for Writ of Habeas Corpus
(3) Grounds raised: Same as those presented to Supreme Court of California in petition for review
(4) Did you receive an evidentiary hearing? N/A
(5) Result: Court appointed Federal Defender Office
(6) Date of result: May 29, 1998
12. State concisely every ground on which you claim that you are being held unlawfully. Summarize briefly the facts supporting each ground. If necessary, you may

attach pages stating additional grounds and facts supporting same.

A. Ground One: The state trial court violated petitioner's right to due process and against self-incrimination under the Fifth and Fourteenth Amendments by admitting into evidence petitioner's involuntary statements to police; Petitioner's right to effective assistance of counsel under the Sixth and Fourteenth Amendments was violated by his appellate counsel's failure to raise this claim on direct appeal

The Fourteenth Amendment to the Constitution provides, pertinent part, that "No State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 2. The Fifth Amendment provides, in pertinent part, "No person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend V.[1] In the landmark case of Jackson v. Denno, the Supreme Court held that these due process guarantees are violated whenever the state relies on an involuntary

1. The Fifth Amendment's privilege against self-incrimination is held applicable to the states through the Fourteenth Amendment. Malloy v. Hogan, 378 U.S. 1, 11 (1964), overruling Twining v. New Jersey, 211 U.S. 78 (1908)).

confession.[2] "[A] defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession." Jackson v. Denno, 378 U.S. 368, 376 (1964). Over one hundred years ago, the Supreme Court set forth the rule of law to be applied to claims of involuntary confessions: a confession "'must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence.'" Malloy, 378 U.S. at 7 (quoting Bram v. United States, 168 U.S. 532, 542-43 (1897)). Conversely, in order to be voluntary, a confession must be "the product of a rational intellect and a free will." Blackburn v. Alabama, 361 U.S. 199, 208 (1960). When a federal habeas court reviews a claim of involuntary confession, it does so de novo. Miller v. Fenton, 474 U.S.

2. Whether the coerced statement is in fact true, indeed whether the coercion used to obtain the statement was not calculated to procure an untrue statement, is irrelevant. Convictions based on coerced confessions must be overturned "not because such confessions are unlikely to be true but because the methods used to extract them offend an underlying principle in the enforcement of our criminal law: that ours is an accusatorial and not an inquisitorial system." Rogers v. Richmond, 365 U.S. 534, 540-41 (1961).

104, 112 (1985). The federal court is not bound by a state court's finding of voluntariness and has a "duty to make an independent evaluation of the record." Mincey v. Arizona, 437 U.S. 385, 398 (9178). As the Ninth Circuit sitting en banc explained:

> [W]e are not bound by state court findings that the conduct of the interrogating officers was not coercive. . . . [W]e are obligated to conduct an independent review of the constitutional acceptability of the . . . interrogation. . . . We take a fresh look at whether the police used objectively unacceptable methods to coerce [the defendant] into waiving his right to silence. In this regard, "the admissibility of a confession turns as much on whether the techniques for extracting the statements, as applied to *this* suspect, are compatible with a system that presumes innocence and assures that a conviction will not be secured by inquisitorial means as on whether the defendant's will was in fact overborne."

Collazo v. Estelle, 940 F.2d 411, 415 (1991) (quoting Miller, 474 U.S. at 116, emphasis in Miller, other internal quotes and citations omitted), cert denied, 502 U.S. 1031 (1992).[3]

3: State court findings as to historical or subsidiary facts are, of course, generally entitled to the statutory presumption of correctness, see 28 U.S.C. 5 2254(d); however, this principle does not come into play in this case because the interrogation of Jacoby was recorded by both audio- and videotape. Accordingly, there are no disputes as to the underlying facts.

In determining whether a confession is involuntary, the court applies a "totality of circumstances" test. Haynes v. Washington, 373 U.S. 503, 513-14 (1963).[4] Some of the relevant factors that the Court has identified over the years in applying this test are the the youth of the accused, his lack of education, the lack of any advice to the accused of his constitutional rights, the length of detention, the repeated and prolonged nature of the questioning, and the use of physical punishment such as the deprivation of food or sleep. Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1972). The Court has cautioned, however, that the presence or absence of any factor is not controlling, and that courts should engage in "a careful scrutiny of all the surrounding circumstances." Id.

When the totality of circumstances surrounding the

---

4. But see White, Police Trickery in Inducing Confessions, 127 U. Pa. L.Rev. 581 (1979), in which the author argues that all promises of tangible benefits made by police during interrogation in order to elicit a confession should be proscribed under a per se rule. According to Professor White, "the difficulty of assessing the effect on the suspect subjected to the interrogation suggests that with respect to this issue the totality of the circumstances test does not provide effective protection for the suspect's constitutional rights." Id. at 623.

interrogation of Jacoby Lee Felix is examined, it becomes clear that (1) the police resorted to inherently coercive tactics to force Jacoby to confess, and (2) the tactics had their intended effect: they overbore Jacoby's will and substantially impaired his free choice. Turning first to the police tactics, the distinguishing characteristic of Jacoby's interrogation was its repeated and prolonged nature. Jacoby was asked to come to the police station "to clear [his] name," and he was told to wait in the lobby when he arrived at the station.[5] CAT 64. Rather than questioning him "as a witness," however, Officer Gardner told him that he was "under arrest for a murder," CAT 62, and he was brought "to a holding room for us as a suspect in this case." CAT 64. The interrogation began at approximately 12:45 a.m., CAT 60, and he was advised of his Miranda rights.[6] CAT 63-64. From the very outset, Gardner

---

5. He had to wait a "long" time in the lobby. CAT 3 6 . "CAT " refers to the Clerk's Augmented Transcript on Appeal. "CT" refers to the Clerk's Transcript on Appeal. "RT" refers to the Reporter's Transcript on Appeal.

6. See Miranda v. Arizona, 384 U.S. 436 (1966).

repeatedly hammered on the theme that permeated the interrogation, clearly implying that if Jacoby told the truth, he'd be given leniency: "[Y]ou've got to help yourself out. You've got to tell me what happened." CAT 66.[7] Evidence acquired through such promises of leniency is not the product of free choice; it is, rather, an involuntary statement that is not admissible against the declarant for any purpose. Shotwell Mfg. Co. v. United States, 371 U.S. 341, 347-48 (1963) ("[e]vidence . . . procured [by any direct or implied promises, however, slight] can no more be regarded as the product of a free act of the accused than that obtained by

---

7. See also CAT 69 ("this is for you to think about how you want to try and help yourself out"), 74 ("Do you want to help yourself?), 75 ("Help yourself out and tell me the truth the first time"), 105 ("We want you to help yourself out"), 108 ("I need you to help yourself here), 117 ("Don't you want to help yourself out? . . . I'm giving you a chance to help yourself out"), 128 ("you got to think of yourself"), 117 ("You have to help yourself out"), 130 ("You're not willing to help yourself out"), 134 ("Get the heat off your shoulders"), 137 ("Take that first step to help yourself. Don' t sink yourself right now"); 144 (in response to Jacoby's question about his chances of "goin' home from this" "A lot of it depends on what you have to say. A lot of it depends on . . ., how straight up you are with me. Note that the exhortation on page 134 is strikingly similar to the interrogation found to have produced the involuntary statement in Bram: "If you had an accomplice, you should say so, and not have the blame of this horrible crime on your own shoulders." Bram, 168 U.S. at 539.

official physical or psychological coercion")). The cumulative effect of these promises and the other coercive interrogation tactics, discussed below, rendered Jacoby's statements involuntary.[8]

Despite Jacoby's adamant and repeated denial of involvement, CAT 65, 68, 96, 119, Gardner kept pressuring him to confess, telling Jacoby that, "You're not being honest with me. You know it and I know it," and "You were there. You know what happened because you saw what happened." CAT 105. Using some of the same psychological ploys and stratagems condemned by the Court in Miranda,[9] Gardner "display[ed] an air of confidence in . . . [Jacoby's] guilt and from outward appearance . . . maintain[ed] only an interest in

---

8. See United States v. Powe, 591 F.2d 833, 845 (D.C. Cir. 1978) (reversing conviction and remanding for hearing on the voluntariness of defendant's statements, which were possibly caused by detective's inquiry as to whether defendant wanted to "cooperate and assist herself in this case and help herself out"); Grades v. Boles, 398 F.2d 409, 412 (4th Cir. 1968) (defendant's statement held involuntary as having been induced by what defendant perceived to be a promise of immunity from prosecution).

9. "'[C]oercion can be mental as well as physical, and . . . the blood of the accused is not the only hallmark of an unconstitutional inquisition.'" Miranda, 384 U.S. at 448 (quoting Blackburn, 361 U.S. at 206)).

confirming certain details." Miranda, 384 U.S. at 450. At the beginning of the interrogation, Gardner falsely tells Jacoby, "We know what happened. I can paint you the whole picture as to what happened. But I need to hear it from you. Understand? I know what went down." CAT 66. He falsely states that "Your partners and the witnesses out in the scene there are identifying you. . . . As . . . --- doing the shooting. As doing the shooting. And I swear to that." CAT 122. Gardner intimidated Jacoby by portraying the police and their tactics as omnipotent, as having locked up the case against him and being able to see his guilt-inspired fear. "I've been around [this department] about fifteen years. All right? I've been workin' homicides for awhile. The combined experience of my partners in there, the two other detectives and myself, we got, what, close to forty, fifty years. . . . [Y]ou got to stop and think about it." CAT 55. "I know you. It's all over your face. You're scared, and I don't blame you. If I was in the shoes that you were in, I'd be scared, too."

CAT 56. "[W]e've interviewed hundreds of people, thousands of people, probably, since the time I've come on. . . . I know you should take that step [of confessing] because it's all over your face. It's written right there. It says, 'I want to talk to you. I want to talk. I want to tell you what happened'." CAT 136-37. When Jacoby's account of the night in question failed to satisfy Gardner, he became accusatory and falsely stated, "I have witnesses that tell me you [shot this man in his car]. I have witnesses that identify you, positively identify you." CAT 119. Gardner further intimidates Jacoby by accusing him of another shooting. CAT 119-20.

It is clear that Jacoby was particularly susceptible to the coercive and intimidating tactics used by the police. Jacoby, who is black, was, at the time of questioning, eighteen years old, CAT 61, and had completed only his sophomore year of high school, CT 721. He was slight of stature: only five feet, five inches tall and weighing 130 pounds. CAT 61. He was

suffering from a cold when the police were interrogating him. CAT 164.[10] As Gardner said, it was clear Jacoby was scared. Jacoby cried, "I -- I want to see my son. I want to be there with my son. I don't want to -- . . . spend the rest of my life in jail." CAT 136. Gardner told Jacoby he was facing a life sentence. CAT 140. Cf., United States v. Tinale, 658 F.2d 1332, 1336-37 (9th Cir. 1981) (confession was involuntary when police recited maximum penalty for crimes of which defendant suspected, told suspect she would not see her two-year-old child "for a while" and that it would be in her best interest to cooperate, which cooperation would be communicated to prosecutor); United States v. Eccles, 850 F.2d 1357, 1360-61 (9th Cir. 1988) (confession was involuntary when FBI agent frightened suspect by telling her her life was in danger, and promised her protection of Witness Protection Program for her and her daughter).

Jacoby's attorney filed a pretrial motion to suppress the

---

10. He was also interrogated in turn by another detective, Toni Winfield. CAT 140.

jailhouse interrogation. During oral argument on the motion, the prosecutor acknowledged that "after a certain point in the interview, there is an express or implied promise of leniency that makes the rest of the statement beyond that point inadmissible." RT 25. She stated that she would not be offering that portion of the statement following line fourteen of page ninety-two (CAT 151) of the transcript.[11/]" The state trial court agrees that "it's after that point in each of these transcripts [referring also to the transcript of the interrogation of co-defendant Mario Lawson] the inadmissible conduct occurs on the part of the interviews [sic]," RT 44 (emphasis added), and the court denied the motion to suppress as to that portion of the statement memorialized in pages one to ninety-two. RT 46. This ruling cannot be squared with the evidence. There is nothing materially different about the coercive and intimidating tactics the police used following page 92 in the transcript than the tactics employed before that point. Nor

11. She did clarify that she intended to offer the statement until that point "for all purposes." RT 26.

did the court offer any precedent for the proposition that part of the statement was admissible while part was not. In fact, "[t]he coerced confession cases, from Bram through Miranda and its progeny, consistently indicate that the failure of the defendant to remain silent does not end the analysis, and that the protection against self-incrimination afforded by the constitutional privilege extends to the exclusion of prior answers when they are involuntarily given." Garner v. United States, 501 F.2d 228, 242 (9th Cir. 1972) (en banc, Koelsch, J. dissenting), atf 'd, 424 U.S. 648 (1976).

The admission of an involuntary statement is reviewed for harmless error. Arizona v. Fulminante, 499 U.S. 279, 310-12 (1991). In determining whether the error was harmless beyond a reasonable doubt, the federal habeas court applies the Brecht standard and must grant the writ when the error has a "'substantial and injurious effect or influence in determining the jury's verdict.'" Brecht v. Abrahamson, 507 U.S. 619, 637 (1993) (quoting Kotteakos v. United States,

328 U.S. 750, 776 (1946)). As Justice Stevens, who provided the fifth vote for the 5-4 majority in Brecht, explained, this standard is "appropriately demanding"; it requires the prosecutor to shoulder the burden to explain why the errors were harmless and the federal court to examine the entire record *de novo* to determine whether the errors influenced the jury's deliberations, and leaves considerable latitude for the exercise of judgment by federal courts. Brecht, 507 U.S. at 640 (Stevens, J. concurring in judgment).

The error in admitting Jacoby's involuntary statement was not harmless, and did in fact have a substantial and injurious effect on the jury's verdict. When this court reviews the cross-examination of Jacoby, it will see that the prosecutor skillfully and repeatedly used many of Jacoby's involuntary statements from the interrogation to impeach his trial testimony.[12/] From matters as basic as how long Jacoby had known his friends, RT 1031-33, and whether LaDonna Harris

---

12. See CT 1031, 1033, 1039, 1040, 1046, 1049, 1052, 1062, 1092, 1109, 1110, 1115, 1116, 1119, 1122, 1123, 1124, 1128, 1134, 1136.

was his girlfriend, RT 1040, to matters concerning the shooting itself, such as whether Jacoby told the police that he saw someone with a gun, RT 1092-93, the prosecutor successfully destroyed Jacoby's credibility. She had him repeatedly admitting that he lied to the police and withheld important information from them. This was a case where the defendant's credibility was crucial. The eyewitnesses to the shooting could not identify the perpetrators because they wore masks. The centerpiece of the prosecution's case was an interview given by Kenneth Williams to the police in which Williams says he heard Jacoby and others planning to rob the victim and that, after the shooting, when he asked Jacoby if he, Jacoby, shot the victim, Jacoby replied, "I think so." At trial, however, Williams consistently denied any memory of his interview with the police, despite being shown videotape excepts in front of the jury. See 12.b, below. The trial essentially became a match of credibility -- the credibility of Jacoby against the credibility of Williams and Nathan Potts, a

snitch who testified in exchange for a promise of no prison time that Jacoby said he was going to shoot a witness to the crime. With Jacoby 's credibility hanging in the balance, it cannot be said that error of admitting his involuntary statements, which were so effectively used to impeach him, was harmless.

The Sixth Amendment provides, in pertinent part, that " [i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defence." U.S. Const. amend. VI. Due process guarantees the right to effective assistance of counsel on the first appeal as of right. Evitts v. Lucey, 469 U.S. 387, 396 (1985). To prevail on a Sixth Amendment claim the defendant "must show that counsel's representation fell below an objective standard of reasonableness," and that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland v. Washington, 466 U.S. 668, 688 , 694 (1984). Jacoby was

denied effective assistance of counsel because his appellate attorney inexplicably failed to raise the trial court's error in admitting the involuntary statement as a ground for appeal. But for that error, there is at least a reasonable probability that the appellate court would have reversed Jacoby's convictions and remanded the case for a new trial. See People v. Vasila, 38 Cal.App.4th 865 (1995).

B. Ground Two: The state trial court violated petitioner's right to confront witnesses by admitting into evidence portions of the videotaped interrogation of Kenneth Williams who, at trial, denied any memory of the interview

The factual background of this claim is stated in the opinion of the state appellate court:

> The centerpiece of the prosecution's case was an interview given by Kenneth Williams to Police Detective Toni Winfield, who was investigating Harper's murder. The interview was transcribed and videotaped, and portions of the tape were played during William's testimony.
>
> Williams, who was in custody at the time on a minor unrelated matter, appeared nervous and upset, crying at the beginning of the interview because "I don't want to snitch on my homies [best friends]." He told Winfield

that just before the robbery he overheard Felix, Lawson and third man, Ellis Curtis, planning to "jack the dude" who lived around the corner for some "weed," meaning to rob Harper to obtain marijuana. Felix had an automatic weapon and Curtis had a .38 revolver.

Williams saw the three men go around the corner and about two minutes later he heard six or seven shots ring out. He then observed Curtis and Felix hop into Harper's car and drive off. Williams saw the trio a short time later going through Harper's car. Williams asked Felix whether he had shot Harper, and Felix relied, "I think so."

At trial, Williams consistently denied any memory of the interview with Detective Winfield, despite being shown videotape excerpts in front of the jury.

Slip op. at 4-5 (footnotes omitted). Over defense objections, the trial court allowed the jury to view portions of the videotaped statements. RT 526-31.

The Sixth Amendment provides, in pertinent part, "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend VI.[13]/13 This right to confrontation embodies the right to cross-examine adverse witnesses, thereby allowing the

13. The Confrontation Clause of the Sixth Amendment is applicable to the States. Pointer v. Texas, 380 U.S. 400, 406 (1965).

defendant to impeach a witness or to show a witness' possible biases, prejudices, or self-interest in testifying. Davis v. Alaska, 415 U.S. 308, 316 (1974); Chipman v. Mercer, 628 F.2d 528, 530 (9th Cir. 1980), overruled on other grounds, Delaware v. Van Arsdall, 475 U.S. 673, 684 (1986). Because the issue of whether a trial court has violated the Confrontation Clause is a question of law involving the accused's right to a fair trial, review is de novo. Selam v. Warm Springs Tribal Correctional Facility, 134 F.3d 948, 951 (9th Cir. 1998).

Some courts have held that "when a witness is wholly unable to testify on direct examination by the state because of a claimed loss of memory, the state should not be permitted to introduce prior statements of the witness as substantive evidence because of the lack of the ability to cross-examine the witness at trial." Creekmore v. Dist. Court of Eighth Judicial District, 745 F.2d 1236, 1237 (9th Cir. 1984) (citing United States v. Palumbo, 639 F.2d 123, 128 n. 6 (3d Cir.),

cert. denied, 454 U.S. 819 (1981); United States v. Classen, 424 F.2d 494, 495 (6th Cir. 1970)). The Ninth Circuit, however, has not had occasion to address the issue. Creekmore, 745 F.2d at 1237 (holding no Sixth Amendment violation when witness testified fully on direct, was extensively crossed, and lapse of memory related to only one aspect of her testimony).

In Douglas v. Alabama, 380 U.S. 415 (1965), the Court broadly held that present yet unresponsive witnesses are unconfrontable. Id. at 419-20. In that case, an alleged accomplice was called as a witness by the state, but when the prosecutor asked about a purported confession he had given the police, he refused to answer. The court declared him a hostile witness and permitted the prosecutor to read from the confession and ask the accomplice, after every few sentences, "Did you make that statement?" Id. at 416. This violated the Sixth Amendment, the Supreme Court explained, because "[s]ince the [prosecutor] was not a witness, the inference

from his reading that [the accomplice] made the statement could not be tested by cross-examination. Similarly, [the accomplice] could not be cross-examined on a statement imputed to but not admitted by him." Id. at 419.

Similarly, in this case, effective confrontation of Williams was impossible because he refused to affirm his unsworn statement to Winfield.[14/] As discussed above, this case came down to a swearing match between Jacoby, on the one hand, and Williams (and, to a lesser degree, Potts) on the other. The unsworn statement of Williams to Winfield, which Williams, once under oath abandoned at trial, was, in the words of the state appellate court, "[t]he centerpiece of the prosecution's case." Slip op. at 4. Thus, just as in Douglas,

---

14. See, e.g., cross examination of Williams at RT 561-62:

Q Do you remember when you told that story to Winfield about seeing the guns, you said that you saw them [i-e., Ellis Curtis and Jacoby] when they were going down around the corner?

A No.

. . . .

Q In fact, you don't remember anything, do you?

A No.

"[t]he alleged statements clearly bore on a fundamental part of the State's case against petitioner. The circumstances are therefore such that inferences from a witness' refusal to answer added critical weight to the prosecution's case in a form not subject to cross-examination, and thus unfairly prejudiced the defendant." Douglas, 380 U.S. at 420 (internal quotes omitted). Accordingly, the state trial court's admission of the videotaped statement of Williams deprived Jacoby of his Sixth Amendment right of confrontation.[15/]

13. **If any of the grounds listed in 12A, B, C, and D were not previously presented in any other court, state or**

---

15. In United States v. Owens, 484 U.S. 554 (1988), the Court held that the defense's opportunity to cross-examine an amnesic victim was adequate to satisfy confrontational requirements even if the cross-examination proved less satisfying than it might have otherwise. Id. at 559. In that case, the defendant, a prisoner, was convicted of beating a prison guard. The guard, who from his hospital bed was able to identify the prisoner as the assailant shortly after the assault, was unable to do so at trial, although he did recall making the identification while in the hospital. The Owens court was careful to note, however, that the defense had available to it a potentially effective line of cross-examination because the guard was able to recall the identification, thus permitting an inquiry into the circumstances under which the statement was made. Id. at 560. This line of inquiry is unavailable when, as here, the witness' asserted inability to remember extends not only to the content, but to the making of the statement. Moreover, Douglas, a case Owens did not purport to overrule, is controlling here where Williams' "memory loss" was clearly feigned. See slip op. at 9.

federal, state briefly what grounds were not so presented, and give your reasons for not presenting them.

The ground listed in 12A was raised in the state trial court, but was not previously presented to the state appellate courts because of the ineffectiveness of appellate counsel, as discussed above.

14. **Do you have any petition or appeal now pending in any court as to the judgment under attack?** No

15. **Give the name and address, if known, of each attorney who represented you in the following states of the judgment attacked herein:**
    (a) **At preliminary hearing:** Mark D. Millard, 901 H Street, Suite 502 Sacramento, CA 95814-1809
    (b) **At arraignment and plea:** Same
    (c) **At trial:** Same
    (d) **At sentencing:** Same
    (e) **On appeal:** Mark D. Greenberg, 484 Lake Park Avenue, Suite 429, Oakland, CA 94610
    (f) **In any post-conviction proceeding:** In propria persona
    (g) **On appeal from any adverse ruling in post-conviction proceedings:** N/A

16. **Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time?** Yes.

17. **Do you have any future sentence to serve after you complete the sentence imposed by judgment under attack?** No

PRAYER FOR RELIEF

Wherefore, petitioner prays that the Court issue the writ of habeas corpus and grant petitioner all other relief to which he may be entitled in this proceeding.

Dated: January 20, 1999

Respectfully submitted,

QUIN DENVIR
Federal Defender

/s/
DAVID M. PORTER
Assistant Federal Defender

Counsel for Petitioner
JACOBY LEE FELIX

I state under penalty of perjury that the foregoing is true and correct.

Executed in Soledad, California, on this 22 of January, 1999

/s/
JACOBY LEE FELIX
Petitioner

QUIN DENVIR, Bar # 49374
Federal Defender
DAVID M. PORTER, Bar # 127024
Assistant Federal Defender
801 K Street, 10th Floor
Sacramento, California 95814
Telephone: (916) 498-5700

Attorneys for Petitioner
JACOBY LEE FELIX

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

JACOBY LEE FELIX, Petitioner, v. DENEICE A. MAYLE, Warden, Respondent, BILL LOCKYER, Attorney General, Additional Respondent,	CIV S 98-0828 WBS GGH P **CERTIFICATE OF SERVICE**

The undersigned hereby certifies that she is an employee in the Office of the Federal Defender for the Eastern District of California and is a person of such age and discretion as to be competent to serve papers.

On February 1, 1999, she personally served a copy of the attached **AMENDED PETITION FOR WRIT OF HABEAS CORPUS PURSUANT TO 28 U.S.C. § 2254** upon respondent by delivery to respondent's counsel as follows:

[Cert. of Service cont'd]

BY MAIL, POSTAGE PRE-PAID

Mathew Chan
Attorney General
P.O. Box 944255
1300 I Street, Suite 1101
Sacramento, CA 95844-2550

Dated: January 29, 1999 /s/

APPENDIX J

THE COURT: Mr. Brakowiecki?

MR. BRAKOWIECKI: Nothing further, your Honor.

HE COURT: Is the witness excused?

MR. MILLARD: Subject to recall.

THE COURT: All right, Mr. Straughter, you're free to leave if you wish. If you're going to be recalled, the attorneys will contact you.

Next witness.

MS. MCGUIRE: Kenneth Williams.

THE CLERK: Stand there, sir, and raise your right hand to be sworn.

Do you solemnly swear that the testimony you may give in the matter now pending before this Court today shall be the truth, so help you God?

THE WITNESS: I do.

THE CLERK: Please be seated in the witness chair. State your name and spell your last name for the

record.

THE WITNESS: Kenneth Williams. W-i-1-1-i-a-m-s.

THE CLERK: Thank you.

TESTIMONY OF

KENNETH WILLIAMS, witness called on behalf of the People herein:

DIRECT EXAMINATION

BY VALERIE L. MCGUIRE, DEPUTY DISTRICT ATTORNEY:

Q Is there some gum in your mouth?

A (Nodded head) .

Q Because you need to testify, so would you throw

that away so we'll be able to understand what you say when you testify, please?

A (Complied).

Q Thank you.

Morning, Kenneth.

A Good morning.

Q Mr. Williams, do you know Jacoby Felix?

A Yeah.

MS. MCGUIRE: Can everyone hear him?

THE COURT: Mr. Williams, you need to keep your voice up so they can hear you.

THE WITNESS: Yeah,

Q (By Ms. McGuire): How is it that you know him?

A We used to go to school together.

Q Are you friends?

A Yes.

Q How long have you and Jacoby Felix been friends?

A Too long.

Q Too long for what?

A Long time.

Q Are you good friends with him?

A Yes.

Q Do you want to testify against him in this case?

A No.

Q Have you told me that?

A Yes.

Q One time or more than one time?

A A long time.

MR. MILLARD: Well, objection, your Honor.

What is someone else's -- it's hearsay. It's

irrelevant.

THE COURT: Overruled.

It goes to his attitude.

Q (By Ms. McGuire) : Why is it that you don't want to

testify against him?

A Because he's my friend.

Q Do you know Mario Lawson?

A Yes.

Q How is it that you know Mario Lawson?

A We just go to school together, too.

Q Is he your friend?

A Yes.

Q How long have you been friends with him?

A Since we've been growing up.

Q Do you want to testify against him?

A No.

Q And why is that?

A Because he's my friend.

Q Are you here in court today because you want to be

here?

A No. Because they ordered me back here.

Q Is that the only reason that you're in court today?

A Uh-huh.

Q You have to say yes or no --

A Yes.

Q -- so the Court Reporter can take it down, please.

How old are you?

A 21.

Q Do you remember how old you were when you met Jacoby Felix?

A Nah-ah.

Q In 1993, what area of Sacramento did you live in?

A Oak Park.

Q How long had you been living in Oak Park?

A Sixteen years, seventeen.

Q What street did you live on?

A 36th Street.

Q And in September of 1993, do you remember what your address was or what street you lived on then?

A Nah.

Q Was it a house or an apartment?

A A house.

Q Was it located somewhere near the Shiloh Arms Apartment Complex --

A Nah-ah.

Q -- in September of '93?

A I don't know. I don't remember.

Q Who did you live with at that time?

A My mom, auntie.

Q Is your mom's name Tina?

A Yes.

Q Is your aunt's name Sadie?

A Yes.

Q Did you live with them in a house on 22nd Avenue?

numbers had been scratched off?

A Yes, it was.

Q On the 28th of October, 1993, was Jacoby Felix at the Sacramento Police Department?

A Yes, he was.

Q And why was he at the Sacramento Police Department?

A He had been asked to come down to the Police Department to be interviewed as part of this investigation.

Q And did he agree to do so?

A Yes, he did.

Q And was he in custody when he was brought down?

A No, he was not.

Q And where was he when you were getting ready to interview him or when you were -- before he was interviewed?

A He was sitting in the lobby area which is a -- kind

of an area that's between the main lobby of the upstairs, second floor of the Hall of Justice, and this lobby area leads from the main lobby area into the Homicide Unit.

Q And then prior to this interview, was he placed in the holding cell?

A Yes, he was.

Q And then was he interviewed in one of the Homicide Division interview rooms?

A Yes, ma'am.

Q And prior to the start of your interviewing him, did you attempt to get some background information from

753

Q And what was the date of that interview?
A Um, January 5th of '94.
Q Had you been trying to interview him sooner than that?
A Yes.
Q Did you interview someone named Kenneth Williams on this case?
A Yes.
Q What was the date of that interview?
A February 4th of '94.
Q And was he in custody at the time you interviewed him?
A Yes.
Q Where was he brought from?
Well, excuse me.
Where was that interview conducted at?
A At the Homicide Division interview room downtown.

Q Was it videotaped?
A Yes.
Q And where was he brought from for that interview?
A The Rio Cosumnes Correctional Center in Elk Grove.
Q Prior to him being brought there, had he requested to be brought there?
A No, not at all.
Q Had he asked for any consideration on the case that he was in custody for?
A No.
Q What was he in custody for at that time?

754

A A misdemeanor. He had a few more days to serve.
Q Did you --
Did he have a few more days because of some consideration you had given him?
A No.

Q Did you give him any consideration or try to get any time or anything for him because he was brought down and you took a statement from him?

A No.

Q At the time of your interview, was he to your knowledge on drugs of any type?

A No. He had been in custody for some time.

Q When, if you know, was he first brought into custody?

A 1-13-94, I believe.

Q January 13th?

A Yes.

Q Did you threaten him to get him to give you a statement?

A Not at all.

Q Did you promise him anything to get him to give you a statement?

A No.

Q On February 4th of 1994, was he a suspect in this case?

A No.

Q And had he been at some point a suspect in the robbery and murder of Richard Harper?

A No.

Q Did you tell him during the course of your interview that he was not a suspect in this case?

A Absolutely. Yes, I did.

Q What was his demeanor when you interviewed him?

A He was very frightened, very nervous, highly upset that I was questioning him about this.

Q Did you ask him what he was frightened of to determine if he was frightened of you?

A No, I didn't ask him what he was frightened of. It was apparent to me that he was very nervous and very

scared, and he expressed why he didn't want to be there.

Q And what was the reason he didn't want to be there?

MR. MILLARD: I'm going to object, your Honor Calls for inadmissible hearsay.

MR. BRAKOWIECKI: Joined.

THE COURT: Well, I believe it's a prior inconsistent statement.

MR. MILLARD: Inconsistent to what?

He testified to that point.

THE COURT: His remarkable failure of recollection at that time.

MR. MILLARD: Okay.

THE WITNESS: He did not want to snitch on his homeys.

MR. MILLARD: I'm going to object and move to strike that, your Honor. That's a conclusion. That's not the

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

DENEICE A. MAYLE, Warden, *Petitioner,*

v.

JACOBY LEE FELIX, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

CERTIFICATE OF SERVICE

I, Mathew Chan, a member of the Bar of this Court, hereby certify that on this 25th day of October, 2004, a copy of Petition For Writ Of Certiorari, in the above-captioned case by personally delivering to the following person at the address as follows:

David M. Porter
Assistant Federal Defender
Office of the Federal Defender
801 I Street, 3rd Floor
Sacramento, CA 95814
(916) 498-5700

(Counsel for Respondent - Jacoby Lee Felix, 3 copies)

All persons required to be served have been so served.

Dated: October 25, 2004

MATHEW CHAN
Deputy Attorney General
Counsel of Record
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 324-5232

(13)

No. 04-563

IN THE SUPREME COURT OF THE UNITED STATES

DENEICE A. MAYLE, Warden, *Petitioner*,

v.

JACOBY LEE FELIX

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

QUIN DENVIR
Federal Defender
for the Eastern District of California

DAVID M. PORTER
Assistant Federal Defender
Counsel of Record

801 I Street, 3rd Floor
Sacramento, California 95814
(916) 498-5700
Counsel for Respondent

QUESTION PRESENTED

Whether two claims, both concerning statements taken by a police officer during the course of an investigation and introduced in violation of the defendant's constitutional rights during his trial, arise from the same "conduct, transaction, or occurrence" for purposes of the relation back doctrine, Rule 15(c)(2), Federal Rules of Civil Procedure?

TABLE OF CONTENTS

Question Presented i

Table of Authorities iii

Relevant Regulatory Provisions 1

Statement of the Case 2

Argument 4

I. The Issue is Not Ripe For Review Because The Question Presented By Petitioner Is Not Raised By The Facts Of This Case And The Court of Appeals' Decision Was Proper Under Either Rule. 4

II. The Issue of How the Relation Back Doctrine of Rule 15(c)(2) Operates in the Context of Federal Habeas Corpus Litigation Is Not Sufficiently Important to Justify a Place on This Court's Docket. 7

III. The Court of Appeals' Application of Rule 15(c)(2) is Correct and Consistent With How the Rule Is Applied in Other Civil Cases. 9

Conclusion 12

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

American Construction Co. v. Jacksonville, T. & K.W. Railway Co., 148 U.S. 372 (1893) 7

Apprendi v. New Jersey, 530 U.S. 466 (2000) 5

Bender v. United States, 2004 U.S. Dist. LEXIS 18014 (D. Maine Sept. 9, 2004) 7

Chavez v. Martinez, 538 U.S. 760 (2003) 10

Davenport v. United States, 217 F.3d 1341 (CA11 2000), *cert. denied*, 532 U.S. 907 (2001) 5

Duncan v. Walker, 533 U.S. 167 (2001) 6, 7

Ellzey v. United States, 324 F.3d 521 (CA7 2003) 5, 9

Farris v. United States, 333 F.3d 1211 (CA11 2003) 5

Hughes Tool Co. v. Trans World Airlines, Inc., 409 U.S. 363 (1973) 8

McKay v. Purckett, 255 F.3d 660 (CA8 2001) 4

Pennsylvania v. Ritchie, 480 U.S. 39 (1987) 11

Tiller v. Atlantic Coast Line R.R. Co., 323 U.S. 574 (1945) 9, 10

United States v. Craycraft, 167 F.3d 451 (CA8 1999) 4

United States v. Duffus, 174 F.3d 333 (CA3), *cert. denied*, 528 U.S. 866 (1999) 4

United States v. Espinoza-Saenz, 235 F.3d 501 (CA10 2000) 4

United States v. Hicks, 283 F.3d 380 (CADC 2002) 4

United States v. Pittman, 209 F.3d 314 (CA4 2000) 4

Wainwright v. Sykes, 433 U.S. 72 (1977) 7

Woodward v. Williams, 263 F.3d 1135 (CA10 2001) 4

FEDERAL STATUTES AND RULES

18 U.S.C. § 3006A(a)(2)(B) 6

28 U.S.C. § 2244(d)(1) 2

Federal Rule of Civil Procedure 15(a) 5

Federal Rule of Civil Procedure 15(c) ..... *passim*

IN THE SUPREME COURT OF THE UNITED STATES

No. 04-563

DENEICE A. MAYLE, Warden, *Petitioner*,

v.

JACOBY LEE FELIX

Respondent, Jacoby Lee Felix, respectfully requests that this Court deny the petition for writ of certiorari seeking review of the lower court's interlocutory opinion in this case.[1]

RELEVANT REGULATORY PROVISION

Rule 15 of the Federal Rules of Civil Procedure provides, in pertinent part:

> (a) Amendments. A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served . . .. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. . . .
>
> . . . .
>
> (c) Relation Back of Amendments. An amendment of a pleading relates back to the date of the original pleading when . . . (2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading.

[1] Respondent has no objection to Petitioner's jurisdictional statement.

STATEMENT OF THE CASE

During the course of a murder investigation, a detective from the Sacramento Police Department took two statements -- the first from Mr. Felix and the second from Kenneth Williams. (App. C6, C20.) During Mr. Felix's trial, the two statements were proffered by the prosecution, and admitted by the trial court over Mr. Felix's objection. He challenged the first statement on the ground that it was coerced in violation of the Fifth Amendment.[2] He challenged the second statement as violating the Confrontation Clause of the Sixth Amendment because Williams, although present at Mr. Felix's trial, claimed he had no memory of the statement. (App. I13-14, I20.)

Following Mr. Felix's conviction, he was sentenced to life imprisonment without the possibility of parole. On direct appeal, the state courts rejected Mr. Felix's claim that admission of Williams's statement violated his right to confront witnesses. Mr. Felix's conviction became final on August 12, 1997. (App. A5.)

On May 8, 1998, Mr. Felix filed in federal court a timely pro se petition for writ of habeas corpus that asserted the Confrontation Clause claim. *Ibid.* On May 29, 1998, the court appointed

[2] At the hearing of the pretrial suppression motion, the prosecutor acknowledged that "after a certain point in the interview, there is an express or implied promise of leniency that makes the rest of the statement beyond that point inadmissible." RT 25. But there is nothing materially different about the coercive and intimidating tactics the police used in the latter part of the interrogation than the tactics employed before that point. At trial, the prosecutor skillfully used the statements to impeach Mr. Felix's credibility, the primary factor on which his defense hinged. (App. I14-16.)

The Warden mistakenly stated that the "first time" Mr. Felix asserted the coerced confession claim was in the amended federal petition. Pet. 3. In fact, Mr. Felix first asserted the claim on May 26, 1995 in his pretrial suppression motion, CT 583, which completely belies the Warden's assertion that she lacked "fair notice of the newly-asserted claim." Pet. 14.

the Office of the Federal Defender to represent Mr. Felix. (App. H2.) On January 28, 1999, Mr. Felix filed, through counsel, an amended federal petition that included the Confrontation Clause claim asserted in the original petition and an additional claim, which alleged that the state court violated his right to due process and his privilege against self-incrimination by admitting the statements he made during the interrogation, and appellate counsel was ineffective for having failed to raise the claim on direct appeal. (App. A5.) After Mr. Felix exhausted the coerced confession claim in state court, the Warden filed her answer. (App. C6-7.)

The district court concluded that the coerced confession claim did not relate back to the filing of the initial petition because it did not arise from the "same core of facts" as the Confrontation Clause claim. It therefore dismissed the coerced confession claim on the ground that it was time-barred by the one-year statute of limitation of the Antiterrorism and Effective Death Penalty Act, 28 U.S.C. § 2244(d)(1). (App. A5.)

The Court of Appeals reversed, holding that because both claims asserted that the Constitution was violated by admission of the statements at Mr. Felix's trial, they both arose from the same "conduct, transaction, or occurrence" as that term is used in Rule 15(c)(2). (App. A9.)

The court explained that Rule 15(c) should be applied literally according to its terms as it is in all other civil litigation. It concluded that the claims in this case fell comfortably within the rule because they asserted that the conviction was tainted by unconstitutional evidence introduced at the trial. The fact that the claims differed, in the sense that they were based on different legal theories, does not mean that they arise from different occurrences. (App. A6.)

It rejected the Warden's view that regards a criminal trial and conviction as a series of perhaps hundreds of individual occurrences. It also rejected the Warden's argument that the

claims in this case involved a different occurrence because Mr. Felix's statements were taken by the police more than three months before Williams's statements. This argument, the court explained, ignored the nature of Mr. Felix's habeas challenge: that the Constitution was violated by admission of the statements *at his trial*, not when the statements were taken. It therefore refused to "look beyond the events of the trial to find the 'conduct, transaction, or occurrence' that is the subject of Felix's claims." (App. A 9-10.) It dismissed the notion that its interpretation of the rule would obliterate the AEDPA's limitation period, because initial petitions would still have to be filed within the period; in fact, a contrary interpretation, one that precluded relation back of new claims, would effectively nullify the rule in habeas proceedings. Finally, it noted that any potential abuses of the relation back doctrine could be controlled by the district court under Rule 15(a), which requires leave of court to file an amendment after a responsive pleading has been filed. (App. A9.)

The Warden did not seek rehearing or suggest rehearing en banc. Instead, the Warden came directly to this Court seeking certiorari review.

ARGUMENT

I.

The Issue is Not Ripe For Review Because The Question Presented By Petitioner Is Not Raised By The Facts Of This Case And The Court of Appeals' Decision Was Proper Under Either Rule.

Respondent claims that the courts of appeals are "intractably divided" over the question presented. Pet. 7. The question framed by respondent is not, however, presented by the facts of this case; moreover, the lower court's decision was proper under either rule.

The question presented on the facts of this case is whether two claims, both concerning statements taken by a police officer during the course of an investigation and introduced in violation of the defendant's constitutional rights during his trial, arise from the same "conduct, transaction, or occurrence" for purposes of the relation back doctrine. This situation contrasts sharply with the cases cited by respondent, which fall into one or both of two categories. The first is cases in which the claims arose during different and discrete points in the litigation, for example, where one claim arose at sentencing and the other claim stemmed from trial error or appeal error.[3] The second category is cases in which different actors are alleged to have violated the petitioner's constitutional rights, for example, where one claim asserts that counsel was ineffective and the other claim challenges a trial court's ruling.[4]

Mr. Felix's coerced confession claim might well have been held to relate back even in

[3] See *United States v. Hicks*, 283 F.3d 380, 388 (CADC 2002) (refusing to relate back *Apprendi* sentencing error claim to trial claim challenging government's promise of leniency in exchange for witness's testimony on the ground that sentencing claim was "totally separate and distinct, in 'both time and type' from [the claim] raised in [the] original motion"); *United States v. Craycraft*, 167 F.3d 451, 457 (CA8 1999) (declining to relate back ineffectiveness claim based on failure to file appeal to ineffectiveness claim based on failure to advance certain arguments at sentencing); *United States v. Duffus*, 174 F.3d 333, 337 (CA3), *cert. denied*, 528 U.S. 866 (1999) (holding that claim asserting trial counsel was ineffective for failing to move to suppress evidence did not relate back to claims of ineffective assistance relating to sentencing and appeal).

[4] See *United States v. Pittman*, 209 F.3d 314, 318 (CA4 2000) (declining to relate back claim against counsel for failure to file an appeal to claims against trial judge for imposing various sentencing enhancements because it "occurred after the sentencing hearing where the court imposed the enhancements"); *McKay v. Purkett*, 255 F.3d 660, 661 (CA8 2001) (per curiam) (rejecting relation back because "the original claims challenged the conduct by the trial court in the state postconviction proceedings, whereas the amended complaint challenged the conduct of McKay's counsel prior to his conviction and sentence"); *United States v. Espinoza-Saenz*, 235 F.3d 501, 503 (CA10 2000)(refusing to relate back ineffective assistance of counsel claims to claims asserting sentencing errors); *Woodward v. Williams*, 263 F.3d 1135, 1142 (CA10 2001) (claims of ineffective assistance of counsel and juror misconduct did not relate back to claim challenging trial court's evidentiary rulings).

these circuits because it is not "totally separate and distinct, in both time and type" from his Confrontation Clause claim. Instead, both claims arise out of a discrete step in the litigation process -- his trial, and attack the same actor -- the state trial judge who admitted the unconstitutional statements into evidence.[5]

The question posed by respondent -- whether a claim relates back when it stems "from the prisoner's trial, conviction, or sentence," Pet. i, -- is simply not presented on the facts of this case. Both of Mr. Felix's claims, the Confrontation Clause claim and the coerced confession claim, arise out of his trial, not his sentence. He raised no independent claim challenging his sentence. *Cf., Ellzey v. United States*, 324 F.3d 521, 525 (CA7 2003) (new claim asserted that counsel was ineffective at sentencing for failing to raise argument based on *Apprendi v. New Jersey*, 530 U.S. 466 (2000)). Respondent apparently believes the lower court's rule should be viewed as encompassing sentencing claims as well because the majority opinion "does not dispute the dissent's charge that the holding also permits relation back of any claims arising out of pre-trial motions or sentencing." Pet. 5, n.2. But there was no reason for the majority to go out of its way

[5] Only the Eleventh Circuit cases, *Davenport v. United States*, 217 F.3d 1341 (2000), *cert. denied*, 532 U.S. 907 (2001), and *Farris v. United States*, 333 F.3d 1211 (2003)(per curiam), do not fall neatly into either of the two categories, and are thus not reconcilable with the lower court's ruling in this case on the ground that the constitutional errors were committed at distinct points in the litigation or by different actors. Unlike this case, however, in both those cases the government had filed a responsive pleading before the amended motions were filed, thus requiring leave of court under Fed.R.Civ. P. 15(a). In *Farris*, the defendant filed a section 2255 motion in 1996, which the district court denied, but on four separate occasions in each of the following years, 1998, 1999, 2000, and 2001, the defendant sought to assert new claims by way of motions for reconsideration and supplemental briefing. 333 F3d at 1213; cf. *Davenport*, 217 F.3d at 1343 (movant sought to add three new claims six months after government filed responsive pleading). Given the obvious delay and abuse, the Eleventh Circuit's conclusion that the district court did not abuse its discretion in denying the request for leave to amend is easily reconciled with the result reached by the lower court in this case, where a single claim was added shortly after the limitation period had expired, prior to any responsive pleading being filed.

to dispute a charge that so plainly had no relevance to the case before it. In any event, the court emphasizes in its repeated holding (App. A7, A9, A10) and its reasoning that the "trial" is the "occurrence" that is the subject of Mr. Felix's claims:

> His coerced confession claim and Confrontation Clause claim assert that the Constitution was violated by the introduction of his confession and the witness's statement *at his trial*. Except for the use of these statements *at his trial*, Felix can state no habeas claim. We therefore reject the State's contention that we should look beyond the events *of the trial* to find the 'conduct, transaction, or occurrence' that is the subject of Felix's claims.

App. 9-10 (first emphasis in original, others added).

II.

The Issue of How the Relation Back Doctrine of Rule 15(c)(2) Operates in the Context of Federal Habeas Corpus Litigation Is Not Sufficiently Important to Justify a Place on This Court's Docket.

Even if there were a direct and irreconcilable split among the circuit courts on the question actually presented by the facts of this case, the issue is not important because it recurs so infrequently and may be reviewed in the ordinary course, if necessary, after a final judgment is entered.

For several reasons, the relation back issue simply does not recur frequently enough to make this an important question deserving of this Court's attention. First, pro se habeas petitioners often do not seek to amend their petitions; they simply reiterate the same claims raised by their attorneys on direct appeal. Amendment is generally limited to cases, such as this, where the district court appoints counsel after having determined that "the interests of justice so require,"18 U.S.C. § 3006A(a)(2), which excludes "the vast majority of federal habeas petitions." *Duncan v. Walker*, 533 U.S. 167, 191 (2001) (Breyer, J., dissenting) (noting finding of U.S.

Department of Justice study that "93% of habeas petitioners in study were pro se").[6] The fact that it took eight years for the issue to be presented as a matter of first impression in the circuit with the largest number of habeas petitions, *see* Federal Judicial Caseload Statistic, Table C-3 at 49-50 (March 31, 2004), *available at* http://www.uscourts.gov/caseload2004/tables/C03Mar04.pdf (last visited November 23, 2004), strongly supports the notion that the issue arises very infrequently.

Second, there are a number of other factors, having nothing to do with pro se status, that prevent petitioners from amending their petitions. The court might rule on the petition before there is a chance to exhaust and amend. *Walker*, 533 U.S. at 191 (dissenting opn.). Following the filing of a responsive pleading, the court might not allow amendment in its discretion. Fed.R.Civ. P. 15(a). The court might dismiss a petition that is not in proper form. R. 2(c), (e), R. Governing § 2254 Cases. Finally, the court might find that a new claim is procedurally defaulted. See *Wainwright v. Sykes*, 433 U.S. 72 (1977).

"Clearly, . . . this court should not issue a writ of certiorari to review a decree of the Circuit Court of Appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." *American Construction Co. v. Jacksonville, T. & K.W. Railway Co.*, 148 U.S. 372, 384 (1893). The decision of the lower court is interlocutory; the case was remanded to the district court for a ruling on the merits of Mr. Felix's coerced confession claim. The Warden has never hinted in the course of this litigation that she would suffer extraordinary inconvenience and embarrassment by

---

[6] Tellingly, while *Ellzey* and the lower court's decision have been on the books for almost 20 months and more than three months, respectively, they have been cited for the relevant point only once in a published opinion, *see Bender v. United States*, 2004 U.S. Dist. LEXIS 18014, *15 (D. Maine Sept. 9, 2004).

having to defend against the coerced confession claim. Indeed, the Warden has already filed an answer setting forth her defense on the merits. There is literally nothing further the Warden would have to do in the district court.[7] If Mr. Felix prevails in that court and the court of appeals, the Warden can then renew the question presented in a certiorari petition from the final judgment. See *Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363, 365 n.1 (1973) (prior denial of certiorari from interlocutory order does "not establish the law of the case or amount to *res judicata* on the points [later] raised"). If Mr. Felix does not prevail, the relation back issue becomes moot. Accordingly, if the issue is to be reviewed at all, the Court should wait for a case, perhaps this one, where certiorari is sought from a final judgment and the issue is outcome determinative.[8]

III.

The Court of Appeals' Application of Rule 15(c)(2) is Correct and Consistent With How the Rule Is Applied in Other Civil Cases.

The Warden argues that the lower court's ruling would "provide all prisoners challenging their conviction or sentences in federal habeas proceedings an advantage over all other civil litigants, for only habeas petitioners would receive the benefits of relation back for virtually any newly-asserted claim." Pet. 15. To the contrary, as the lower court emphasized, it was applying Rule 15(c)(2) as it does in all "other civil litigation," (App. A6), in its "usual, less restrictive

---

[7] Neither party has requested an evidentiary hearing or expansion of the record.

[8] During the interim, the circuits whose cases the Warden relies on, which cases predate the lower court's decision and *Ellzey*, might have an opportunity to revisit the issue with the benefit of those better reasoned decisions.

manner" (App. A8), according to the "usual definition" (App. A9):

> A new "claim" will nearly always rest on a legal theory, and often on a subset of facts within the larger transaction or occurrence, that differs from those underlying the claim asserted by the original pleading. That is the reason that an amendment becomes necessary.

(App. A7.)

As Judge Easterbrook explained for the Seventh Circuit, it is those courts that disallow relation back on the ground that the petitioner seeks to raise a new theory that misconstrue how Rule 15(c) operates in civil practice:

> Courts that have declined to allow new theories to be added by amendment effectively read "conduct, transaction, or occurrence" to refer to single events in a criminal proceeding--an objection to particular evidence, each aspect of a calculation under the Sentencing Guidelines, and so on. Each step of the trial, and each legal argument, becomes a separate transaction or occurrence. Yet this is *not* how the phrase "conduct, transaction, or occurrence" is used in civil practice. That phrase sums up the "same transaction" approach to the law of preclusion (and thus to compulsory joinder): all legal issues and claims for relief arising out of a single transaction may (and often must) be raised together, and Rule 15(c) specifies that anything that would be barred, if not brought now, may be added and litigated. . . . [A]ll avenues of challenging a single sentence are one "claim" for purposes of the AEDPA--that facts rather than legal arguments define the "claim". . . . [¶] . . . A prisoner who comes up with ten different ways to contest his sentence still is litigating about a single transaction or occurrence (the supposedly unlawful sentence), so an amendment necessarily relates back under Rule 15(c)(2).

Ellzey, 324 F.3d at 525-26 (emphasis added).

This Court's decision in *Tiller v. Atlantic Coast Line R.R. Co.*, 323 U.S. 574 (1945), demonstrates that both the lower court's decision and *Ellzey* properly applied Rule 15(c)(2). In *Tiller*, the plaintiff filed a complaint following the death of her husband, seeking relief under the Federal Employers' Liability Act because the defendant failed to provide a proper lookout for the deceased, to give him proper warning of the approach of the train, to keep the head car properly lighted, and to warn the deceased of an unprecedented and unexpected change in the manner of

shifting cars. After the limitations period expired, she filed an amended complaint alleging that the defendant violated the Federal Boiler Inspection Act by failing to have a locomotive properly lighted. The Court held that the Boiler Act claim related back to the FELA claim because both claims "related to the same general conduct, transaction, and occurrence which involved the death of the deceased." *Id.* at 581. "The cause of action now," the Court explained, "as it was in the beginning, is the same -- it is a suit to recover damages for the alleged wrongful death of the deceased. . . . There is no reason to apply a statute of limitations when, as here, the respondent has had notice from the beginning that petitioner was trying to enforce a claim against it because of the events leading up to the death of the deceased in respondent's yard." *Ibid.*

Clearly, some of the facts underlying the two claims -- whether the railroad company provided a proper lookout and whether it failed to have the locomotive properly lighted -- were different, as were the legal theories of relief. The claims nevertheless arose from the "same general conduct, transaction, and occurrence" because they both allegedly led to the "the death of the deceased." In this case, some of the facts underlying the two claims are different: the statements (by different declarants) were taken at different points during the investigation. But the claims arise from the same occurrence because they both allegedly led to the unconstitutional conviction of Mr. Felix. In other words, the "operative facts" are that the statements were both admitted into evidence at Mr. Felix's trial in violation of the Constitution. *See Chavez v. Martinez*, 538 U.S. 760, 769 (2003) ("mere coercion does not violate the text of the Self-Incrimination Clause absent use of the compelled statements in a criminal case against the witness"); *Pennsylvania v. Ritchie*, 480 U.S. 39, 52 (1987) ("the right to confrontation is a *trial* right, designed to prevent improper restrictions on the types of questions that defense counsel

may ask during cross-examination"). Accordingly, there is no reason to apply a statute of limitations when the Warden has had notice from the beginning that Mr. Felix was trying to enforce a claim against her because his conviction was the result of statements admitted against him in violation of the Constitution.

CONCLUSION

For the foregoing reasons, the Court should deny the petition for a writ of certiorari.

Dated: November 24, 2004

Respectfully submitted,

QUIN DENVIR
Federal Defender

DAVID M. PORTER
Assistant Federal Defender
Counsel of Record

Attorneys for Respondent
JACOBY LEE FELIX

Supreme Court, U.S.
FILED
NOV 24 2004
OFFICE OF THE CLERK

No. 04-563

IN THE SUPREME COURT OF THE UNITED STATES

DENEICE A. MAYLE, Warden, *Petitioner*,

v.

JACOBY LEE FELIX

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENT'S MOTION TO PROCEED IN FORMA PAUPERIS

QUIN DENVIR
Federal Defender
for the Eastern District of California

DAVID M. PORTER
Assistant Federal Defender
Counsel of Record

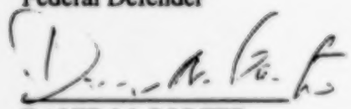
801 I Street, 3rd Floor
Sacramento, California 95814
(916) 498-5700
Counsel for Respondent

Pursuant to Rule 39 of the Rules of the United States Supreme Court, the Respondent, Jacoby Lee Felix, requests leave to file the accompanying Respondent's Brief in Opposition without prepayment of fees or costs, and to proceed in forma pauperis. Mr. Felix was appointed counsel at government expense under the Criminal Justice Act, 18 U.S.C. § 3006(a)(2)(B), by the United States District Court for the Eastern District of California on May 29, 1998.

Dated: November 24, 2004

Respectfully submitted,

QUIN DENVIR
Federal Defender



DAVID M. PORTER
Assistant Federal Defender
Counsel of Record

Attorneys for Respondent
JACOBY LEE FELIX

COPY

(2)

Supreme Court, U.S.
FILED
DEC 2 - 2004
OFFICE OF THE CLERK

No. 04-563

IN THE SUPREME COURT OF THE UNITED STATES

DENEICE A. MAYLE, Warden, *Petitioner,*

v.

JACOBY LEE FELIX, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONER

BILL LOCKYER
Attorney General of the State of California
MANUEL M. MEDEIROS
State Solicitor General
ROBERT R. ANDERSON
Chief Assistant Attorney General
MARY JO GRAVES
Senior Assistant Attorney General
JANET E. NEELEY
Supervising Deputy Attorney General
BRIAN R. MEANS
Supervising Deputy Attorney General
MATHEW CHAN
Deputy Attorney General
Counsel of Record
1300 I Street
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 324-5232
Fax: (916) 324-2960
Counsel for Petitioner

TABLE OF CONTENTS

	Page
I. THE NINTH CIRCUIT ACKNOWLEDGED THERE IS A SPLIT OF AUTHORITY AMONG THE CIRCUITS	1
II. THE ISSUE OF WHETHER RULE 15(C)(2) SHOULD BE APPLIED IN A MANNER THAT ERODES THE EFFECTIVENESS OF THE STATUTE OF LIMITATIONS UNDER THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996 ("AEDPA") IS OF GREAT IMPORTANCE AND WARRANTS REVIEW BY THE COURT	4
III. RESPONDENT'S ARGUMENTS ON THE MERITS MERELY SERVE TO AFFIRM THAT THE CIRCUIT COURTS DISAGREE OVER THE PROPER APPLICATION OF RULE 15(C)(2)	6
CONCLUSION	8

TABLE OF AUTHORITIES

	Page
Cases	
Anthony v. Cambra, 236 F.3d 568 (9th Cir. 2000)	4
Apprendi v. New Jersey, 530 U.S. 466 (2000)	3
Artuz v. Bennett, 531 U.S. 4 (2000)	5
Bender v. United States, 2004 WL 2011449 (D.Me., Sept. 9, 2004)	5
Carey v. Saffold, 536 U.S. 214 (2002)	5
Davenport v. United States, 217 F.3d 1341 (11th Cir. 2000)	2, 3
Duncan v. Walker, 533 U.S. 167 (2001)	5
Dykes v. Lampert, 2004 WL 2370555 (9th Cir. (Or.) Oct. 21, 2004)	1, 5
Earl X v. Morrow, 2004 WL 1941268 (9th Cir. (Or.) Aug. 30, 2004)	1, 5
Ellzey v. United States, 324 F.3d 521 (7th Cir. 2003)	3, 6

TABLE OF AUTHORITIES (continued)

	Page
Ryan v. Clarke, 387 F.3d 785 (8th Cir., Oct. 29, 2004)	5
Tiller v. Atlantic Coast Line R. Co., 323 U.S. 574 (1945)	6, 7
United States v. Pittman, 209 F.3d 314 (4th Cir. 2000)	2
Zabrinas v. McKune, 2004 WL 2011454 (D.Kan., Aug. 30, 2004)	5
Statutes	
Fed. R. Civ. P. 15(a)	2, 5
Fed. R. Civ. P. 15(c)	6, 7
Fed. R. Civ. P. 15(c)(2)	1, 2, 4-6
Court Rules	
Rule 11 of the Rules Governing Section 2254	6
Other Authorities	
Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)	4, 6, 7

IN THE SUPREME COURT OF THE UNITED STATES

No. 04-563

DENEICE A. MAYLE, *Petitioner,*

v.

JACOBY LEE FELIX, *Respondent.*

I.

THE NINTH CIRCUIT ACKNOWLEDGED THERE IS A SPLIT OF AUTHORITY AMONG THE CIRCUITS

Respondent cannot dispute the clear split of authority among circuits regarding the proper application of Federal Rule of Civil Procedure 15(c)(2) to habeas proceedings. Contrary to Respondent's view, the Ninth Circuit's analysis reflects that its definition of "conduct, transaction or occurrence" was not governed by the specific facts in this case, and that its holding was meant to have broader application.[1/]

---

1. Two recent unpublished decisions by the Ninth Circuit have applied the holding in this case in other circumstances. *See Dykes v. Lampert*, 2004 WL 2370555 (9th Cir. (Or.) Oct. 21, 2004) (due process claim based on court's ruling to admit hearsay testimony related back to petition that alleged ineffective assistance of counsel and a due process claim that trial transcripts were significantly altered); *Earl X v. Morrow*, 2004 WL 1941268 (9th Cir. (Or.) Aug. 30, 2004) (new claim that state failed to disclose that petitioner had served as informant against the victim relates back to original petition that alleged claims of ineffective assistance of

Respondent attempts to factually distinguish this case from those of other circuits that have more narrowly interpreted "conduct, transaction or occurrence" by noting that his coerced confession claim and his Confrontation Clause claim both stemmed from the same discrete point in litigation (his trial) and from the actions of the same actor (the trial judge). (Opp. 5-6.) He makes artificial distinctions that have never been acknowledged, let alone adopted, by any court that has applied Rule 15(c)(2) to habeas proceedings. And Respondent fails to distinguish each opposing case. (See Opp. 6, n.5.)

In *Davenport v. United States*, 217 F.3d 1341 (11th Cir. 2000), the Eleventh Circuit, guided by cases from the Third, Fourth and Eighth Circuits, found that new claims of ineffective assistance of counsel at the sentencing stage did not relate back to the original habeas motion, which had also alleged ineffective assistance of counsel at sentencing.[2] *Id.* at 1343, 1346. In *United States v. Pittman*, 209 F.3d 314 (4th Cir. 2000), the Fourth Circuit found that a new claim challenging an enhancement for obstruction of justice for failure to appear at sentencing did not relate back to the initial habeas motion, which included an allegation that the enhancement for a prior conviction was improper. *Id.* at 317-18. Thus, other circuits have denied relation-back under factual situations analogous to this case–i.e., where the claims stem from the same point in litigation and from the actions of the same actor.

More importantly, the Ninth Circuit recognized that there is no relevant distinction between the facts in this case and those of other circuits that would have allowed its holding to be reconciled. In addressing the opposing case authority, the Ninth Circuit stated, "we cannot distinguish these cases, and so we

---

counsel).

2. That the inmate in *Davenport* needed leave of the court to file an amended motion is irrelevant. The case focused on the application of Rule 15(c)(2). *Davenport*, at 1343-46. Federal Rule of Civil Procedure 15(a) was not even mentioned.

reject their rule in favor of that of [*Ellzey v. United States*, 324 F.3d 521 (7th Cir. 2003)]." (App. A8.)

Respondent also attacks the scope of the question presented by stressing that this case involved claims that arose out of his trial, not his sentence. (Opp. 6-7.) However, the Ninth Circuit had embraced *Ellzey*, a case that did not restrict "conduct, transaction or occurrence" to the trial and conviction. (App. A4.) In *Ellzey*, the Seventh Circuit decided whether added arguments based on *Apprendi v. New Jersey*, 530 U.S. 466 (2000), relate back to a timely-filed habeas motion based on ineffective assistance of counsel at sentencing. *Ellzey*, 324 F.3d at 525. The *Ellzey* court concluded that "[a] prisoner who comes up with ten different ways to contest his sentence still is litigating about a single transaction or occurrence (the supposedly unlawful sentence), so an amendment necessarily relates back under Rule 15(c)(2)." *Id.* at 526. In addition, the Ninth Circuit had stated its disagreement with cases that hold that "the untimely claim must have more in common with the timely filed claim than the mere fact that they arose out of the same trial and sentencing proceedings." *See Davenport*, 217 F.3d at 1344. Thus, the dissent expressed a reasonable understanding that the holding in this case provides that "any claim stemming from pre-trial motions, the trial, or sentencing relates back to a timely-filed habeas petition . . . ." (App. A13.) Certainly, if the Ninth Circuit did not mean or want its decision to be so construed, it would have responded accordingly.

In any event, Respondent cannot dispute that there is a clearly established split of authority regarding whether "conduct, transaction or occurrence" means the inmate's "state trial and conviction." (App. A4, A7-A8.)

II.

THE ISSUE OF WHETHER RULE 15(C)(2) SHOULD BE APPLIED IN A MANNER THAT ERODES THE EFFECTIVENESS OF THE STATUTE OF LIMITATIONS UNDER THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996 ("AEDPA") IS OF GREAT IMPORTANCE AND WARRANTS REVIEW BY THE COURT

The dissent opined that the decision "obliterates AEDPA's one year statute of limitations." (App. A13.) Nonetheless, Respondent asserts that the question presented is not important because the relation-back issue simply does not arise that often. (Opp. 7-8.) Not so.

The filing of a habeas petition by counsel is not rare; in fact, habeas petitions in capital cases are generally filed by counsel.[3/] Thus, the filing of an amendment to add new claims following expiration of the statute of limitations, especially in capital cases, can be expected in the Seventh and Ninth Circuits, where Rule 15(c)(2) has been so broadly interpreted. This case may also encourage amendments in other Circuits as well.

That the Ninth Circuit only recently sought to define "conduct, transaction or occurrence" does not indicate that the question presented is raised infrequently. Instead, it only reflects that the Ninth Circuit was able to previously resolve relation-back issues without having to determine the full scope of Rule 15(c)(2)'s application. (See App. A8, citing *Anthony v. Cambra*, 236 F.3d 568, 576-77 (9th Cir. 2000).) In any event, the number of cases from the various circuits regarding the proper application of Rule 15(c)(2) to habeas proceedings belies the notion that the relation-back issue rarely arises. (Pet. 7-8.)

---

3. And the law does not limit a pro per inmate's ability to amend his petition any more than that of a represented inmate should he chose to do so.

Since this case was decided, there have been three published cases that applied Rule 15(c)(2) in the habeas context–i.e., *Ryan v. Clarke*, 387 F.3d 785, 789 (8th Cir., Oct. 29, 2004); *Bender v. United States*, 2004 WL 2011449, *4-8 (D.Me., Sept. 9, 2004); *Zabrinas v. McKune*, 2004 WL 2011454 (D.Kan., Aug. 30, 2004).[4/] Obviously, the issue regarding the proper application of Rule 15(c)(2) to habeas proceedings is an ongoing concern.

In addition, the existence of factors, other than the statute of limitations, that could prevent the filing of an amendment does not diminish the importance of the question presented. Regardless of whether these other factors would effectively preclude amendment, the Ninth Circuit decision still allows the district court to grant leave to habeas petitioners to add new (and even exhausted) claims to their petitions, without adequate notice and after expiration of the statute of limitations.[5/] (Pet. 15.)

Respondent also asserts that this Court should not review this case because the Ninth Circuit decision is interlocutory. (Opp. 8-9.) This Court frequently grants certiorari before resolution of the case on the merits when the statute of limitations is involved. *E.g.*, *Carey v. Saffold*, 536 U.S. 214, 218 (2002); *Duncan v. Walker*, 533 U.S. 167, 171 (2001); *Artuz v. Bennett*, 531 U.S. 4, 6 (2000).

---

4. Also, there have been two unpublished decisions from the Ninth Circuit. *Dykes v. Lampert*, 2004 WL 2370555; *Earl X v. Morrow*, 2004 WL 1941268. And of course, there may be any number of district court decisions addressing the relation-back issue that have not yet reached that circuit.

5. And leave of court is not even required when a responsive pleading has not yet been filed. Fed. R. Civ. P. 15(a).

III.

RESPONDENT'S ARGUMENTS ON THE MERITS MERELY SERVE TO AFFIRM THAT THE CIRCUIT COURTS DISAGREE OVER THE PROPER APPLICATION OF RULE 15(C)(2)

The majority of circuits that have addressed the applicability of Rule 15(c)(2) to habeas proceedings have found that new claims do not relate back simply because they arose out of the same trial, conviction or sentence that was challenged in a timely file petition. (Pet. 7-9.) Some circuits have found that a broad interpretation of "conduct, transaction or occurrence" to allow for such relation back of claims would undermine the limitations period set by Congress in the AEDPA. (Pet. 11.) Others have stressed that too broad an interpretation of "conduct, transaction or occurrence" fails to provide adequate notice. (Pet. 14.)

Respondent argues that *Ellzey's* analysis demonstrates that the other circuits have misconstrued how Rule 15(c) operates in civil practice. As the dissent in this case observed, *Ellzey* does not offer "a convincing reason to deviate from 'the central policy of Rule 15(c)–ensuring that the nonmoving party has sufficient notice of the facts and claims giving rise to the proposed amendment.'" (App. A17.) In addition, *Ellzey* does not account for Rule 11 of the Rules Governing Section 2254 (and the Committee Notes thereto), which reflects that Rule 15(c) should not be rigidly applied in a manner that would be inconsistent in the overall framework of habeas corpus–i.e., in a manner that is incompatible with the intent behind the AEDPA. (Pet. 12-13.)

Contrary to Respondent's view, this Court's decision in *Tiller v. Atlantic Coast Line R. Co.*, 323 U.S. 574 (1945) does not demonstrate that *Ellzey* and this case properly applied Rule 15(c)(2). *Tiller* was not a habeas corpus case and was decided well before enactment of the AEDPA. That case did not raise

the question presented herein and really has no bearing on it. Respondent can hardly claim that *Tiller* stands for the proposition that Rule 15(c) applies to habeas corpus proceedings in the exact manner as general civil cases when AEDPA's statue of limitations did not exist at the time, and when this Court has never ruled that Rule 15(c) applies to habeas proceedings. (Pet. 6, n.3.)

CONCLUSION

For the foregoing reasons, and those stated in the petition, the petition for writ of certiorari should be granted.

Dated: December 2, 2004

Respectfully submitted,

BILL LOCKYER
Attorney General of the State of California

MANUEL M. MEDEIROS
State Solicitor General

ROBERT R. ANDERSON
Chief Assistant Attorney General

MARY JO GRAVES
Senior Assistant Attorney General

JANET E. NEELEY
Supervising Deputy Attorney General

BRIAN R. MEANS
Supervising Deputy Attorney General



MATHEW CHAN
Deputy Attorney General
Counsel of Record

Counsel for Petitioner

MKC:bam
SA2003FA0014

ORIGINAL

Supreme Court, U.S.
FILED
FEB 15 2005
OFFICE OF THE CLERK

No. 04-563

IN THE SUPREME COURT OF THE UNITED STATES

DENEICE A. MAYLE, Warden, *Petitioner,*

v.

JACOBY LEE FELIX, *Respondent.*

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX

DAVID M. PORTER*
Assistant Federal Defender
Office of the Federal Defender
801 I Street, 3rd Floor
Sacramento, CA 95814
Telephone: (916) 498-5700
Counsel for Respondent

BILL LOCKYER
Attorney General of the State of California
MANUEL M. MEDEIROS
State Solicitor General
ROBERT R. ANDERSON
Chief Assistant Attorney General
MARY JO GRAVES
Senior Assistant Attorney General
JANET E. NEELEY
WARD A. CAMPBELL
Supervising Deputy Attorneys General
MATHEW CHAN*
Deputy Attorney General
Counsel of Record
1300 I Street
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 324-5232
Fax: (916) 324-2960
Counsel for Petitioner

*Counsel of Record

RECEIVED
FEB 18 2005
OFFICE OF THE CLERK
SUPREME COURT, U.S.

PETITION FOR CERTIORARI FILED OCTOBER 25, 2004
CERTIORARI GRANTED JANUARY 7, 2005

TABLE OF CONTENTS

	Page
Notation re Location of Materials	1
Chronological List of Relevant Docket Entries	2-4
Opinion of United States Court of Appeals for the Ninth Circuit, filed on Aug. 9, 2004	5-22

NOTATION RE LOCATION OF DOCUMENTS

The following petitions, opinions, findings and recommendations, orders and other materials have been omitted in printing this joint appendix because they appear in the appendices in the Petition for Certiorari as follows:

	Appendix
Unpublished opinion of the Court of Appeal of the State of California, Third Appellate District, filed on Feb. 25, 1997	E
Original Petition for Writ of Habeas Corpus filed on May 8, 1998, in U.S. District Court for the Eastern District of California (exhibits omitted)	G
Amended Petition for Writ of Habeas Corpus filed on Jan. 28, 1999, in the Eastern District (exhibits omitted)	I
Findings and Recommendations filed on Feb. 9, 2001, in the Eastern District	C
Findings and Recommendations filed on May 14, 2002, in the Eastern District	D
Court Order filed on July 1, 2002, in the Eastern District	B
Eastern District Court Docket Sheet	H

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

February 25, 1997	The Court of Appeal of the State of California, Third Appellate District, affirmed the judgment against defendant, Jacoby Lee Felix
May 14, 1997	The California Supreme Court denied Mr. Felix's petition for review
May 8, 1998	Original petition for writ of habeas corpus filed in United States District Court for the Eastern District of California
May 29, 1998	The Magistrate Judge ordered that the Federal Defender be appointed as counsel for Mr. Felix
September 15, 1998	The Magistrate Judge ordered that "petitioner shall file an amended petition . . . ."
January 28, 1999	Amended petition for writ of habeas corpus filed in the United States District Court
February 2, 1999	Petition for writ of habeas corpus filed in the California Supreme Court
February 25, 1999	Respondent, Warden (Deneice A. Mayle), filed a motion in the United States District Court to dismiss the amended petition

May 26, 1999	The California Supreme Court denied Mr. Felix's habeas corpus petition
June 24, 1999	The Magistrate Judge granted the Warden's request to vacate the hearing on the motion to dismiss
September 29, 1999	The Warden filed an answer to the amended petition for writ of habeas corpus
February 9, 2001	The Magistrate Judge issued findings and recommendations, recommending denial of the amended petition
June 13, 2001	Oral argument before United States District Court
June 16, 2001	District Court issued order referring matter back to the Magistrate Judge
May 14, 2002	The Magistrate Judge issued additional findings and recommendation, recommending denial of the amended petition
July 1, 2002	Order by United States District Court Judge adopting the findings and recommendations in full
November 6, 2002	United States Court of Appeals for the Ninth Circuit received District Court order granting certificate of appealability
November 4, 2003	Case argued and submitted to Ninth Circuit

April 13, 2004	Ninth Circuit issued order withdrawing case from submission pending the decision by the United States Supreme Court in *Pliler v. Ford* (03-221)
July 8, 2004	Ninth Circuit order resubmitting case in light of decision in *Pliler v. Ford*
August 9, 2004	Ninth Circuit filed opinion and entry of judgment

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JACOBY LEE FELIX,
Petitioner-Appellant,

v.

DENEICE A. MAYLE, Warden,
Respondent-Appellee.

No. 02-16614
D.C. No.
CV-98-00828-WBS
OPINION

Appeal from the United States District Court
for the Eastern District of California
William B. Shubb, District Judge Presiding

Argued and Submitted
November 4, 2003 – San Francisco, California
Submission Withdrawn April 13, 2004
Resubmitted July 8, 2004

Filed August 9, 2004

Before: William C. Canby. Jr., William A. Fletcher, and
Richard C. Tallman, Circuit Judges

Opinion by Judge Canby;
Partial Concurrence and Partial Dissent by Judge Tallman

SUMMARY

Criminal Law and Procedure/Habeas Corpus

The court of appeals affirmed a judgment of the district court in part, reversed in part, and remanded. The court held that when a habeas petitioner challenging a state conviction amends his federal petition to include a new claim, the amendment relates back to the date of filing of his petition under Federal Rule of Civil Procedure 15(c)(2), because the new claim arises out of the same transaction or occurrence as his original petition as the transaction or occurrence in issue is his state trial and conviction.

Appellant Jacoby Felix was convicted of first degree murder and second degree robbery in California state court. On appeal to the California Court of Appeal, he argued that the admission into evidence of videotaped statements of a key prosecution witness violated his Sixth Amendment right to confront the witnesses against him. The Court of Appeal affirmed the judgment. The California Supreme Court subsequently denied Felix's Petition for Review. Felix then filed a federal habeas corpus petition, raising the same arguments that were raised in his state appeal. Subsequent to the expiration of the Antiterrorism and Effective Death Penalty Act's (AEDPA's) one-year statute of limitations for habeas relief, Felix filed an amended petition that included the Confrontation Clause claim asserted in the original petition and an additional claim, which alleged that the state court violated his right to due process and his Fifth Amendment right against self-incrimination by admitting into evidence allegedly involuntary statements that Felix had made during a police interview. The district court accepted the recommended finding of the magistrate judge that the coerced confession claim did not relate back under Rule 15(c)(2) because it did not arise from the "same core of facts" as the Confrontation Clause claim, and was thus time-barred under AEDPA. In addition, the district court dismissed Felix's Confrontation Clause claim on the merits.

Felix appealed.

[1] Rule 15(c) applies to federal habeas corpus cases, and provides, in part, that an amendment of a pleading relates back to the date of the original pleading when the claim or defense in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading. [2] The Ninth Circuit joined with the Seventh Circuit in determining that the proper "conduct, transaction, or occurrence" in a habeas context is the trial and conviction under attack. [3] The language of Rule 15(c)(2) supported this conclusion. [4] Thus, it had to be held that the district court erred in ruling that Felix's coerced confession claim did not relate back to his initial petition under Rule 15(c)(2), and its judgment on this point had to be reversed and remanded.

[5] With regard to Felix's claim that the district court erred in dismissing his Confrontation Clause claim on the merits, the court of appeals determined that the state court's ruling on this claim was not contrary to, nor an unreasonable application of, clearly established federal law, nor did it involve an unreasonable determination of the facts. Thus, the district court's dismissal of this claim had to be affirmed.

Judge Tallman concurred in part and dissented in part, writing that by defining "conduct, transaction, or occurrence" as broadly as the majority had, so that any claim stemming from pre-trial motions, the trial, or sentencing relates back to a timely-filed habeas petition. AEDPA's one-year statute of limitation would be obliterated.

COUNSEL

David M. Porter, Assistant Federal Defender, Sacramento, California, for the petitioner-appellant.

Mathew Chan, Deputy Attorney General, Sacramento, California, for the respondent-appellee.

OPINION

CANBY, Circuit Judge:

This case, in which state prisoner Jacoby Lee Felix seeks a federal writ of habeas corpus to overturn his state conviction, presents an important question of federal civil procedure that has divided other circuits. The question is this: when a habeas petitioner challenging a state conviction amends his federal petition to include a new claim, does the amendment relate back to the date of filing of his petition and thus avoid the one-year limitation of the Antiterrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. § 2244(d)(1)? That question in turn depends upon the interpretation of Federal Rule of Civil Procedure 15(c)(2), which provides that an amendment relates back to the date of the original pleading when "the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth . . . in the original pleading." We join the Seventh Circuit in concluding that a prisoner's new claim arises out of the same transaction or occurrence as his original petition because the transaction or occurrence in issue is his state trial and conviction. *See Ellzey v. United States*, 324 F.3d 521 (7th Cir. 2003).[1] The claim thus relates back under Rule 15(c)(2). We accordingly reverse the ruling of the district court holding Felix's claim of coerced confession to be time-barred.

---

1. *Ellzey* and cases to be discussed later from other circuits that conflict with *Ellzey* arose in the context of challenges to federal convictions or sentences under 28 U.S.C. § 2255, but their reasoning applies equally to cases like Felix's that challenge state convictions under 28 U.S.C. § 2254.

Felix also argues that the district court erred in dismissing his Confrontation Clause claim on the merits. We find no error, and we accordingly affirm the district court's dismissal of the Confrontation Clause claim.

FACTUAL BACKGROUND

In 1995, Felix was convicted of first degree murder and second degree robbery in California state court. On appeal to the California Court of Appeal, he argued that the admission into evidence of videotaped statements of a key prosecution witness violated his Sixth Amendment right to confront the witnesses against him. The Court of Appeal affirmed the judgment. The California Supreme Court subsequently denied Felix's Petition for Review and his state conviction became final on August 12, 1997.

On May 8, 1998, Felix filed in federal district court a *pro se* petition for writ of habeas corpus raising the same arguments that were raised in his state appeal. AEDPA's one-year statute of limitations for habeas relief expired on August 11, 1998. On January 28, 1999, Felix filed, through counsel, an amended petition that included the Confrontation Clause claim asserted in the original petition and an additional claim, which alleged that the state court violated his right to due process and his Fifth Amendment right against self-incrimination by admitting into evidence allegedly involuntary statements that Felix had made during a police interview. The district court accepted the recommended finding of the magistrate judge that the coerced confession claim did not relate back under Rule 15(c)(2) because it did not arise from the "same core of facts" as the Confrontation Clause claim. The court accordingly held the coerced confession claim to be time-barred by AEDPA's one-year limitation.

Felix filed a timely notice of appeal and the district court issued a certificate of appealability for the coerced confession and Confrontation Clause claims. We have jurisdiction under 28 U.S.C. § 2253 and we review the district court's decision *de novo*. *See Clark v. Murphy*, 331 F.3d 1062, 1067 (9th Cir. 2003).

DISCUSSION

A

[1] Rule 15(c) applies to federal habeas corpus cases. *See Anthony v. Cambra*, 236 F.3d 568, 576 (9th Cir. 2000). That Rule provides, among other things:

> [a]n amendment of a pleading relates back to the date of the original pleading when . . . the claim or defense in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading.

Fed. R. Civ. P. 15(c)(2). In other civil litigation, we have required relation-back of new claims arising from the same "conduct, transaction, or occurrence" as the claim in the original complaint, even when the new claims are based on a different legal theory of which there was no warning in the original pleading. *See Kern Oil & Ref. Co. v. Tenneco Oil Co.*, 840 F.2d 730, 736 (9th Cir. 1988). We fail to see why this literal application of Rule 15(c) should not apply to habeas corpus proceedings.

[2] The Confrontation Clause claim asserted by Felix in his original federal petition arose from the trial that ended with his conviction in state court. His coerced confession claim arises from the same transaction—his trial and conviction in state court. Both claims assert that the conviction was tainted by

unconstitutional evidence introduced at his trial. The fact that the claims differ does not mean that they arise from different occurrences. It unduly strains the usual meaning of "conduct, transaction, or occurrence" to regard a criminal trial and conviction as a series of perhaps hundreds of individual occurrences. The Seventh Circuit explained that in such an approach:

> [e]ach step of the trial, and each legal argument, becomes a separate transaction or occurrence. Yet this is not how the phrase "conduct, transaction, or occurrence" is used in civil practice. That phrase sums up the "same transaction" approach to the law of preclusion (and thus to compulsory joinder): all legal issues and claims for relief arising out of a single transaction may (and often must) be raised together, and Rule 15(c) specifies that anything that would be barred, if not brought now, may be added and litigated.

Ellzey, 324 F.3d at 526. We agree with *Ellzey* that the proper "conduct, transaction, or occurrence" in a habeas context is the trial and conviction under attack.

[3] The language of Rule 15(c)(2) supports our conclusion. It provides for the relation back of a "claim" added by amendment if the new claim arises from the same conduct, transaction or occurrence set forth in the original pleading. A new "claim" will nearly always rest on a legal theory, and often on a subset of facts within the larger transaction or occurrence, that differs from those underlying the claim asserted by the original pleading. That is the reason that an amendment becomes necessary. But if such differences are sufficient to prevent relation back under Rule 15(c)(2), that provision of the Rule will be rendered virtually meaningless in the habeas context.

We accordingly disagree, respectfully, with the decisions of

several circuits that deny relation back under Rule 15(c)(2) when a new claim rests on a theory or facts within a trial not raised in the original habeas petition. *See United States v. Hicks*, 283 F.3d 380, 388 (D.C. Cir. 2002); *Davenport v. United States*, 217 F.3d 1341, 1344-45 (11th Cir. 2000); *United States v. Pittman*, 209 F.3d 314, 317-18 (4th Cir. 2000); *United States v. Duffus*, 174 F.3d 333, 337-38 (3rd Cir. 1999); *United States v. Craycraft*, 167 F.3d 451, 457 (8th Cir. 1999). We distinguished these cases in *Anthony*, 236 F.3d at 577, but neither endorsed nor rejected their rule because we found it unnecessary to "determine here the full scope of [Rule 15(c)(2)'s] application to amendments of habeas petitions." *Id.* at 576. Today we cannot distinguish these cases, and so we reject their rule in favor of that of *Ellzey*.

One of the concerns expressed in some of these cases and in the dissent here is that interpreting "conduct, transaction, or occurrence" in the usual, less restrictive manner would erode the effectiveness of AEDPA's one-year statute of limitations. *See, e.g., Hicks*, 283 F.3d at 388. AEDPA, however, still requires the original petition to be filed within the one-year period (with exceptions not relevant here). Giving effect to Rule 15(c)(2) does not, therefore, nullify AEDPA's one-year period.[2/] On the other hand, precluding relation back of new claims effectively nullifies Rule 15(c)(2) in habeas proceedings. We decline to read Rule 15(c)(2) in a way that contravenes the ordinary meaning of its language and renders it meaningless in the

2. In asserting that our decision "obliterates AEDPA's one year statute of limitation," Judge Tallman's dissent undervalues the strict requirement that the original federal habeas petition be filed within that time. The dissent also fails to take account of the very considerable incentive for a state prisoner to file all of his or her claims in the original petition or by amendment as soon thereafter as possible. If the prisoner delays, final judgment may be entered on the unamended petition, and the prisoner will almost certainly be unable to meet the strict requirements for a second petition to address the additional claim. *See* 28 U.S.C. § 2244(b)(2).

habeas context. As the Seventh Circuit pointed out, abuses of Rule 15 can be controlled by the district court under subsection (a), which requires leave of court to file an amendment after a responsive pleading has been filed.[3/] *See* Fed. R. Civ. P. 15(a); *Ellzey*, 324 F.3d at 527.

The State argues here that, even if the usual definition is given to the term, Felix's two claims do not arise from the same "conduct, transaction, or occurrence" within the meaning of Rule 15(c)(2). The State argues that the coerced confession claim arises out of an interrogation of Felix conducted by police on October 28, 1993, while the Confrontation Clause claim is based on statements voluntarily made by a witness more than three months later. This argument, however, ignores the nature of Felix's habeas challenge. Felix is not bringing a civil action to recover damages for the alleged coercion exerted by police at the time they secured his confession, and he certainly asserts no claim based on the voluntary statement made by another person at another time. He is challenging the usual subject of a habeas petition—the custody that results from his conviction and trial. His coerced confession claim and Confrontation Clause claim assert that the Constitution was violated by the introduction of his confession and the witness's statement *at his trial*. Except for the use of these statements at his trial, Felix can state no habeas claim. We therefore reject the State's contention that we should look beyond the events of the trial to find the "conduct, transaction, or occurrence" that is the subject of Felix's claims.

We also reject the State's contention that permitting Felix's claims to relate back will frustrate the purpose of Rule 15(c)(2) to give notice to the non-moving party that such an amendment might be contemplated. It is true that, in *Anthony*, 236 F.3d at 576-77, we held that the State clearly had notice of claims

3. In general, however, "leave shall be freely given when justice so requires." Fed. R. Civ. P. 15(a).

sought to be added by amendment. But that was only one way of rejecting the State's argument in *Anthony* that notice beyond identity of "conduct, transaction, or occurrence" was required. We long ago rejected the argument that relation back under Rule 15(c)(2) required a "fair warning" of the amendment beyond the warning inherent in, and required by, the language of the rule. *Kern Oil*, 840 F.2d at 736. "Under Rule 15, the only question is whether the later claims arise out of the conduct, transaction, or occurrence brought to the defendant's attention by the initial claim." *Id.* Here, Felix's initial petition brought his trial and conviction to the attention of the State, and it could anticipate amendments challenging allegedly unconstitutional rulings at that trial. Rule 15(c)(2) as interpreted in *Kern Oil* requires no more.[4]

[4] We conclude, therefore, that the district court erred in ruling that Felix's coerced confession claim did not relate back to his initial petition under Rule 15(c)(2). We accordingly reverse the district court on this point and remand for further proceedings with respect to that claim.[5]

B

[5] The remaining issue raised by Felix concerns his Confrontation Clause claim. He contends that the state court

---

4. Our decision in *Ford v. Hubbard*, 330 F.3d 1086 (9th Cir. 2002), has no bearing on our ruling here because it was vacated and reversed in *Pliler v. Ford*, 2004 WL 1373174 (U.S. June 21, 2004). It therefore has no precedential effect. *See Roe v. Anderson*, 134 F.3d 1400, 1404 (9th Cir. 1998). The Supreme Court in *Pliler* declined to reach any issues of relation back under Rule 15.

5. Our disposition of this issue renders it unnecessary for us to address in detail Felix's contention that the State waived its defense based on AEDPA's one-year limitation. Suffice it to say that, in urging the district court to rule on both the limitation and the merits, the State did not waive its limitation defense.

violated his right to confront witnesses by admitting into evidence portions of a videotaped interview given by a key prosecutorial witness, even though the witness denied any memory of the interview at trial. The circumstances indicated strongly that the witness's loss of memory was feigned. Felix argues that his right to cross-examine was effectively nullified.

Felix is entitled to relief from his state court conviction only if the state court's ruling "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or . . . was based on an unreasonable determination of the facts." 28 U.S.C. § 2254(d); *Lockyer v. Andrade*, 538 U.S. 63 (2003) (explaining AEDPA's standard). We conclude that Felix fails to meet that standard. The Supreme Court has held that the Confrontation Clause of the Sixth Amendment is not violated by the admission of a prior identification by a witness who is unable, because of memory loss, to testify concerning the basis for the identification. *United States v. Owens*, 484 U.S. 554, 564 (1988). Although *Owens* did not address the question of a witness who *feigned* memory loss, no other Supreme Court decision has addressed that point either. The state court's decision that the admission of a videotaped statement of a witness who is unable, because of *feigned* memory loss, to testify concerning the basis for the statement is not contrary to nor an unreasonable application of *Owens*, nor of any other Supreme Court case.

Felix argues that the state court's ruling was contrary to *Douglas v. Alabama*, 380 U.S. 415, 419 (1965), in which the Supreme Court held that admission of a prior statement by a witness who, at trial, claimed a Fifth Amendment right not to respond, violated the Sixth Amendment. *Douglas* is distinguishable, however, because there was no way to cross-examine the witness who had invoked the Fifth Amendment on the subject. In the present case, as in *Owens*, Felix was free to

cross-examine the witness on "such matters as the witness' bias, his lack of care and attentiveness, his poor eyesight, and even (what is often a prime objective of cross-examination . . .) the very fact that he has a bad memory." *Owens*, 484 U.S. at 559. The state court's ruling was not contrary to, nor an unreasonable application of, either *Owens* or *Douglas*, nor did it involve an unreasonable determination of the facts. We therefore affirm the district court's dismissal of this claim.[6]

CONCLUSION

Felix's coerced confession claim relates back under Federal Rule of Civil Procedure 15(c)(2) to his timely original petition because it arose out of the same conduct, transaction, or occurrence set forth in his original pleading — namely, his state trial and conviction. We reverse the district court's dismissal of that claim and remand for further proceedings with regard to it. We affirm the district court's dismissal of Felix's Confrontation Clause claim.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

TALLMAN, Circuit Judge, concurring in part and dissenting in part:

I

Today the court holds that the petitioner's newly-minted and

---

6. Our rejection of Felix's Confrontation Clause claim on the merits makes it unnecessary for us to address the State's alternative contention that Felix is seeking the benefit of a new rule that could not be applied retroactively to his case. *See Teague v. Lane*, 489 U.S. 288 (1989).

untimely-raised coerced confession claim is saved by the "relation back" doctrine of Fed. R. Civ. P. 15(c)(2) because it "arises from the same transaction—his trial and conviction" as petitioner's timely-filed Confrontation Clause claim. By defining "conduct, transaction, or occurrence" so broadly that any claim stemming from pre-trial motions, the trial, or sentencing relates back to a timely-filed habeas petition, the court obliterates AEDPA's one year statute of limitation.

The majority of those circuits to consider the intersection of Rule 15(c) and Congress' strict statute of limitation have more narrowly interpreted "conduct, transaction, or occurrence" to mean that in order to relate back, "the untimely claim must have arisen from the 'same set of facts' as the timely filed claim, not from separate conduct or a separate occurrence in 'both time and type.' " *Davenport v. United States*, 217 F.3d 1341, 1344 (11th Cir. 2000).[1] I would follow this better reasoned rule because it pays proper respect to the limitation period established by AEDPA. I thus respectfully dissent from Section A of the court's opinion. I agree with the court that the petitioner's Confrontation Clause claim fails on the merits.

II

The "relation back" doctrine is not easily applied to habeas corpus petitions. Habeas corpus litigation is, by definition, a collateral attack on the finality of a criminal judgment following direct appeal or a conscious decision to forgo direct attack. Although we have held that Rule 15 applies to habeas petitions, *Anthony v. Cambra*, 236 F.3d 568, 576 (9th Cir. 2000), we have never considered the limits of how such amendments interact

---

1. *Accord United States v. Hicks*, 283 F.3d 380, 389 (D.C. Cir. 2002); *United States v. Pittman*, 209 F.3d 314, 318 (4th Cir. 2000); *United States v. Duffus*, 174 F.3d 333, 337 (3d Cir. 1999); *United States v. Craycraft*, 167 F.3d 451, 457 (8th Cir. 1999).

with the limitation period. In doing so, we must keep in mind that by enacting strict time restrictions on the filing of habeas petitions, Congress obviously intended to expedite the processing of collateral attacks. *See United States v. Hicks*, 283 F.3d 380, 389 (D.C. Cir. 2002).

In this case, there have already been several rounds of criminal and civil collateral review at all levels of the California trial and appellate court system, which spanned three years. The petitioner timely filed his original pro se habeas petition in federal court on May 8, 1998, within the limitation period. Although well aware of the facts supporting his coerced confession claim when he filed this original petition, he waited nine months to amend it and add the new claim. Petitioner is certainly entitled to continue testing the validity of his otherwise final state first-degree murder conviction by now proceeding in federal court. But the law requires him to bring all of the claims about which he clearly possesses the facts in a timely-filed habeas petition. *See United States v. Pittman*, 209 F.3d 314, 318 (4th Cir. 2000) (finding that petitioner's claims in the amended petition "were not overly technical and he could have easily included them in his original [petition]").

Rejecting this court's interpretation of "conduct, transaction, or occurrence" as too expansive, our sister circuits have observed:

> Yet this holding views "occurrence" at too high a level of generality. The fact that amended claims arise from the same trial and sentencing proceeding as the original motion does not mean that the amended claims relate back for purposes of Rule 15(c). If we were to craft such a rule, it would mean that amendments . . . would almost invariably be allowed even after the statute of limitations had expired, because most [habeas] claims arise from a criminal defendant's underlying conviction and sentence. Such a broad view of "relation back" would undermine the limitations period set by Congress in the AEDPA.

Pittman, 209 F.3d at 318.

The better rule is that enunciated by the Eleventh Circuit in *Davenport*:

> In order to relate back, the untimely claim must have arisen from the "same set of facts" as the timely filed claim, not from separate conduct or a separate occurrence in "both time and type."

217 F.3d at 1344. The whole point of enacting AEDPA was to eliminate drawn-out and unlimited collateral attacks on criminal judgments. *See Hicks*, 283 F.3d at 389; *Pittman*, 209 F.3d at 318. In its zeal to allow this late claim to be addressed on the merits, the court invokes the "relation back" doctrine to swallow AEDPA's statute of limitation, rendering it a virtual nullity through which an unlimited number of amendments must be liberally permitted so long as the original collateral attack was timely filed.[2/]

---

2. The court states that the more narrow interpretation underestimates the incentive for a petitioner to file on time because of the possibility that the district court might rule on the petition before he files an amendment. It is the court that underestimates the amount of time required by our district judges to consider and resolve habeas petitions. This case, pending for four years and three months before entry of final judgment, is a good example. Under the court's expansive invocation of Rule 15(c), petitioner presumably could have amended his petition any number of times as long as "justice so require[d]." District courts would have difficulty ever bringing habeas cases to a close if the broad rule preferred by my colleagues is allowed to stand.

III

The court glosses over the fact that by applying the "relation back" doctrine in these circumstances, the original petition utterly failed to give fair notice to the State of the petitioner's new claim. The court relies on *Kern Oil & Refining Co. v. Tenneco Oil Co.*, 840 F.2d 730 (9th Cir. 1988), which involved a typical civil action for breach of contract and fraud, for the proposition that notice is irrelevant. However, in *Anthony v. Cambra*, 236 F.3d 568 (9th Cir. 2000), we acknowledged that the notice inquiry is indeed proper in the application of Rule 15(c) to amend habeas petitions. My colleagues unpersuasively distinguish our discussion of Rule 15(c) in *Anthony*, where we held that a petitioner's amended petition related back because each of its specific claims had been set forth in the original petition. *Id.* at 576. Relying on the guiding principle that "the touchstone of Rule 15(c) is notice," we found that "it is plain that the central policy of Rule 15(c)—ensuring that the non-moving party has sufficient notice of the facts and claims giving rise to the proposed amendment—ha[d] been satisfied." *Id.* (distinguishing the results in *Duffus* and *Craycraft* because "in those cases, the courts specifically relied on the *absence* of notice to the state regarding the content of the proposed amendments as grounds for denying the motions").

Not only is the requirement of fair notice supported by our court's own precedent, this rationale has also been adopted by our sister circuits. In *Craycraft*, the Eighth Circuit relied on the lack of sufficient notice to find that an amendment did not relate back:

> Craycraft's original complaint alleged deficiencies of representation distinctly separate from the deficiency alleged in his amendments. Failing to file an appeal is a separate occurrence in both time and type from a failure to pursue a downward departure or failure to object to the type of drugs at issue. We cannot say that his original petition would provide notice of such a different sort of theory. Therefore, the amendment cannot relate back under Rule 15(c) and it must be time barred.

Id. Neither my colleagues nor the Seventh Circuit in *Ellzey v. United States*, 324 F.3d 521 (7th Cir. 2003), which the court embraces, have offered a convincing reason to deviate from "the central policy of Rule 15(c)—ensuring that the nonmoving party has sufficient notice of the facts and claims giving rise to the proposed amendment." *Anthony*, 236 F.3d at 576.

IV

In this case, the petitioner's timely-filed claim alleged that his Sixth Amendment right to confront witnesses was violated when the court admitted during his 1995 trial a videotaped police interview of one of the State's witnesses. The petitioner's untimely claim alleges that the trial court improperly denied a pre-trial motion to suppress petitioner's incriminating statement made to police on October 28, 1993. Here, it simply cannot be said that these claims arise from the same set of facts; rather, they arise from distinctly separate occurrences of both time and type. *See Hicks*, 283 F.3d at 389 (holding that a claim that the government failed to prove the quantity of drugs at trial did not relate back to a timely-filed claim that the government's willingness to grant leniency in exchange for testimony tainted the petitioner's trial).[3]

---

3. *See also Davenport*, 217 F.3d at 1346 (newly offered claims of ineffective assistance of counsel did not relate back to timely-filed claims of ineffective assistance of counsel because they were raised on different sets of facts); *Pittman*, 209 F.3d at 317-18 (claims regarding obstruction of justice enhancement and failure of counsel to file an appeal did not relate back to claims that the district court lacked jurisdiction to impose an enhanced sentence and the government failed to establish by a preponderance of the evidence that the drugs at issue were crack cocaine);

V

While an amendment offered to clarify or amplify the facts already alleged in support of a timely claim may relate back, an amendment that introduces a new legal theory based on facts different from those underlying the timely claim may not. *See Hicks*, 283 F.3d at 388. "These principles are faithful both to the underlying purposes of Rule 15(c) and to the concerns about drawn-out and unlimited collateral attacks on . . . criminal judgments evinced by the passage of AEPDA. They ensure that relation back will be allowed only where the original motion provides adequate notice of the [petitioner's] claims and the proposed amendment would neither change the fundamental nature of those claims nor prejudice the [State's] defense by requiring it to prepare its case anew." *Id.* at 389.

The petitioner's original habeas petition challenging the introduction of his former co-defendant's videotaped interview was timely. "His amendments thereto were not." *Craycraft*, 167 F.3d at 456. I respectfully dissent from application of the "relation back" doctrine to preserve his amended but time-barred coerced confession claim simply because it relates to his underlying conviction and sentence.

Duffus, 174 F.3d at 337-38 (claim of ineffective assistance of counsel for failing to move to suppress evidence did not relate back to claim of ineffective assistance of counsel for failing to contend on appeal that evidence was insufficient to support conviction); *Craycraft*, 167 F.3d at 457 (deficiencies of representation alleged in timely-filed petition were separate from the deficiencies alleged in the untimely amended claims because "[f]ailing to file an appeal is a separate occurrence in both time and type from a failure to pursue a downward departure or failure to object to the type of drugs at issue").

COPY

(3)

No. 04-563

Supreme Court, U.S.
FILED
FEB 15 2005
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

DENEICE A. MAYLE, Warden, *Petitioner,*

v.

JACOBY LEE FELIX, *Respondent.*

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S BRIEF ON THE MERITS

BILL LOCKYER
Attorney General of the State of California
MANUEL M. MEDEIROS
State Solicitor General
ROBERT R. ANDERSON
Chief Assistant Attorney General
MARY JO GRAVES
Senior Assistant Attorney General
JANET E. NEELEY
WARD A. CAMPBELL
Supervising Deputy Attorneys General
MATHEW CHAN
Deputy Attorney General
Counsel of Record
1300 I Street
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 324-5232
Fax: (916) 324-2960
Counsel for Petitioner

QUESTION PRESENTED

When a habeas petitioner challenging a state judgment amends his petition to include a new claim, does the amendment relate back to the date of the filing of his petition and thus avoid the one-year statute of limitations, 28 U.S.C. § 2244(d)(1), so long as the new claim stems from the prisoner's trial, conviction, or sentence?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	1
STATUTORY PROVISIONS AND FEDERAL RULES INVOLVED	1
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	6
ARGUMENT	8
IN THE CONTEXT OF HABEAS CORPUS, FEDERAL RULE OF CIVIL PROCEDURE 15(c)(2) IS NOT PROPERLY READ TO ENCOMPASS ANY AND ALL CLAIMS THAT STEM FROM THE PRISONER'S TRIAL, CONVICTION, OR SENTENCE	8
A. The Ninth Circuit's Expansive Reading of Rule 15(c)(2) Significantly Undermines The Purposes Of AEDPA's Statute Of Limitations	8
1. The Ninth Circuit's Reading Would Allow Prisoners To Engage In An "End Run" Around The Statute Of Limitations By Belated Addition Of Unrelated And Untimely Claims To A "Placeholder" Petition	10

TABLE OF CONTENTS (continued)

	Page
2. The Ninth Circuit's Reading Effectively Nullifies This Court's Construction Of AEDPA's Tolling Provision, 28 U.S.C. § 2244(d)(2), In *Duncan v. Walker*	13
3. Contrary To The Ninth Circuit's Contention, The Effectuation Of Congress' Purpose In Enacting AEDPA's Statute of Limitations Cannot Be Left To The Discretion Of District Judges Under Rule 15(a)	16
B. Unlike The Ninth Circuit's Approach, The Warden's Interpretation Of Rule 15(c)(2) Is Consistent With The Rule's Proper Application In Ordinary Civil Cases	18
1. The Ninth Circuit's Reasoning Conflicts With The Policy Of "Fair Notice" That Informs The Relation Back Doctrine	18
a. The "Fair Notice" Policy Has Arisen In Civil Contexts To Illuminate The Parameters Of The Relation Back Doctrine	19
b. The Ninth Circuit's Sweeping Interpretation Of Rule 15(c)(2) Is Inconsistent With The "Fair Notice" Policy	21
2. The Idea Of "Same Transaction," As Used To Address Issues Of Res Judicata And Compulsory Joinder In Civil Proceedings, Is Inappropriate In The Context Of Habeas Corpus Proceedings	25

TABLE OF CONTENTS (continued)

Page

3. The Warden's Interpretation Of Rule 15(c)(2), Does Not Nullify Application Of The Relation Back Doctrine To Habeas Proceedings 27

CONCLUSION 29

APPENDIX 1a

TABLE OF AUTHORITIES

Page

Cases

Apprendi v. New Jersey,
530 U.S. 466 (2000) 4

Brady v. Maryland,
373 U.S. 83 (1963) 27

Cahill v. Rushen,
678 F.2d 791 (9th Cir. 1982) 28

Camp v. Gregory,
67 F.3d 1286 (7th Cir. 1995) 16

Davenport v. United States,
217 F.3d 1341 (11th Cir. 2000) 5

Davenport v. United States,
217 F.3d 1341 (11th Cir. 2000) 9, 27

Duncan v. Walker,
533 U.S. 167 (2001) 7, 10, 13-15

Ellzey v. United States,
324 F.3d 521 (7th Cir. 2003) *passim*

Farris v. United States,
333 F.3d 1211 (11th Cir. 2003) 11

Felix v. Mayle,
379 F.3d 612 (9th Cir. 2004) 1

TABLE OF AUTHORITIES (continued)

	Page
Felker v. Turpin, 518 U.S. 651 (1996)	26
Foman v. Davis, 371 U.S. 178 (1962)	17
Fuller v. Marx, 724 F.2d 717 (8th Cir. 1984)	11, 20
Harris v. Nelson, 394 U.S. 286 (1969)	8
Lonchar v. Thomas, 517 U.S. 314 (1996)	26
Mandacina v. United States, 328 F.3d 995 (8th Cir. 2003)	27
Massiah v. United States, 377 U.S. 201 (1964)	28
Mayes v. Leipziger, 729 F.2d 605 (9th Cir. 1984)	16
McKay v. Puckett, 255 F.3d 660 (8th Cir. 2001)	9
Miranda v. Arizona, 384 U.S. 436 (1966)	28
Moore v. Baker, 989 F.2d 1129 (11th Cir. 1993)	17, 20

TABLE OF AUTHORITIES (continued)

	Page
Nettis v. Levitt, 241 F.3d 186 (2d Cir. 2001)	20
Percy v. San Francisco General Hosp., 841 F.2d 975 (9th Cir. 1988)	20
Pliler v. Ford, ___ U.S. ___, 124 S. Ct. 2441 (2004)	15, 24
Rodriguez v. United States, 286 F.3d 972 (7th Cir. 2002)	10, 17
Rose v. Lundy, 455 U.S. 509 (1982)	24
Schlanger v. Seamans, 401 U.S. 487 (1971)	8
Schneckloth v. Bustamonte, 412 U.S. 218 (1973)	9
Tiller v. Atlantic Coast Line R. Co., 323 U.S. 574 (1945)	19, 20
Transaero, Inc. v. La Fuerza Aerea Boliviana, 162 F.3d 724 (2d Cir. 1998)	26
United States v. Cicero, 214 F.3d 199 (D.C. Cir. 2000)	13
United States v. Craycraft, 167 F.3d 451 (8th Cir. 1999)	10, 23

TABLE OF AUTHORITIES (continued)

	Page
United States v. Duffus, 174 F.3d 333 (3rd Cir. 1999)	9
United States v. Espinoza-Saenz, 235 F.3d 501 (10th Cir. 2000)	9, 12, 13
United States v. Hicks, 283 F.3d 380 (D.C. Cir. 2002)	9, 23
United States v. Pittman, 209 F.3d 314 (4th Cir. 2000)	9, 12
Williams v. Taylor, 529 U.S. 420 (2000)	9
Wilson v. Fairchild Republic Co., Inc., 143 F.3d 733 (2d Cir. 1998)	24
Woodford v. Garceau, 538 U.S. 202 (2003)	9, 15
Woodward v. Williams, 263 F.3d 1135 (10th Cir. 2001)	9, 13, 27
Constitutional Provisions	
U.S. Const.	
amend V	28
amend VI	28

TABLE OF AUTHORITIES (continued)

	Page
Statutes	
28 U.S.C.	
§ 1254(1)	1
§ 2242	10
§ 2244(b)(2)	27
§ 2244(d)	1
§ 2244(d)(1)	i-3
§ 2244(d)(1)(A)-(D)	10
§ 2244(d)(1)(B), (C) & (D)	26
§ 2254	3, 13
§ 2254(b)	1
§ 2254(b)(1)	24
§ 2254(b)(3)	24
§ 2255	2, 4, 13
42 U.S.C.	
§ 1983	20
Fed. R. Civ. P.	
13(a)	1, 26, 27
15(a)	*passim*
15(c)	*passim*
15(c)(2)	*passim*
81(a)(2)	1, 9
Pub. L. No. 104-132, Stat. 1214	2
Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA")	*passim*

TABLE OF AUTHORITIES (continued)

	Page
Court Rules	
Rule 11 of the Rules Governing Section 2254	1, 7-9
Other Authorities	
3 J. Moore et al., *Moore's Federal Practice* § 15.11 (3d ed. 2004)	16
3 J. Moore, et al., *Moore's Federal Practice* § 15.12[1] (3d ed. 2004)	16
3 J. Moore et. al., *Moore's Federal Practice* § 15.14[1] (3d ed. 2004)	17
3 J. Moore et al., *Moore's Federal Practice* § 15.19[2] (3d ed. 2004)	18, 28
6 C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 1409 (2d ed. 1990)	26
6A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 1497 (2d ed. 1990)	11, 18, 26
U.S. Dept. of Justice, Office of Justice Programs, Bureau of Justice Statistics, Federal Habeas Corpus Review: Challenging State Court Criminal Convictions (1995)	14

IN THE SUPREME COURT OF THE UNITED STATES

No. 04-563

DENEICE A. MAYLE, Warden, *Petitioner,*

v.

JACOBY LEE FELIX, *Respondent.*

OPINIONS BELOW

The opinion of the United States Court for Appeals for the Ninth Circuit (Ninth Circuit) is reported as *Felix v. Mayle*, 379 F.3d 612 (9th Cir. 2004). (J.A. 5-22.)

STATEMENT OF JURISDICTION

The judgment of the Ninth Circuit was entered on August 9, 2004. The petition for writ of certiorari was filed on October 25, 2004, and granted on January 7, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AND FEDERAL RULES INVOLVED

The statutory provisions and federal rules involved are as follows: 28 U.S.C. §§ 2244(d), 2254(b); Rule 11 of the Rules Governing Section 2254; Federal Rules of Civil Procedure 13(a), 15(a) & (c), 81(a)(2). These provisions and rules are

printed in the appendix at the end of this brief.

STATEMENT OF THE CASE

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") established a one-year limitations period for the filing of federal habeas corpus petitions challenging federal and state convictions and sentences. Pub. L. No. 104-132, Stat. 1214; 28 U.S.C. § 2244(d)(1), § 2255. At issue in this case is the application of that limitations period when a state petitioner timely files his initial habeas petition, but then amends the petition after the limitations period has expired and adds a new and unrelated claim. Is the new claim time-barred or does it "relate back" to the original petition under Federal Rule of Civil Procedure 15(c)(2), which provides for the relation back of an amendment of a pleading when "the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading"?

1. In 1995, Jacoby Lee Felix was tried in Sacramento, California, for a 1993 robbery/murder. During trial, portions of a videotaped interview between Detective Toni Winfield and Kenneth Williams, conducted on February 4, 1994, were played for the jury. (Tr. 533-537, 539, 543, 548, 550, 753-755.) In addition, Detective Jeffrey Gardner testified as to statements Felix made to Detective Winfield and himself on October 28, 1993.[1/] (Tr. 4, 30, 722-732.) Felix was convicted of first degree murder with the "special circumstance" that the murder occurred during the course of the robbery, and second degree robbery. He was sentenced to life imprisonment without the possibility of parole. (Pet. App. C1-2, E1-2.)

On appeal, Felix argued in part that admission of the

1. The trial court had denied Felix's pretrial motion to suppress his statements. (Tr. 4-5, 26-33, 44-46.)

extrajudicial statements of Kenneth Williams violated his constitutional right to confront witnesses. However, Felix did not contest the use of his own statements to the police. (Pet. App. E.) The state's intermediate court affirmed the judgment. (Pet. App. E.) The California Supreme court denied Felix's petition for review. (Pet. App. F.)

2. On May 8, 1998, Felix filed in the United States District Court, Eastern District of California, a timely in pro per petition for writ of habeas corpus under 28 U.S.C. § 2254, which contained fully exhausted claims, including a Confrontation Clause claim based on the trial court's admission of statements from Kenneth Williams. (Pet. App. G.) Three weeks later, the district court appointed the Federal Defender to represent Felix. (Pet. App. C6.) The district court held a pretrial conference and thereafter set a briefing schedule. (Pet. App. H3.)[2/]

On August 12, 1998, the one-year period of limitations provided by the AEDPA expired. (Pet. App. C9-10, citing 28 U.S.C. § 2244(d)(1).) Over five months later, on January 28, 1999, Felix filed an amended petition, which omitted all but one of the claims in the original habeas petition. (Pet. App. I.) In Claim Two of the amended petition, Felix repeated his Confrontation Clause claim. In Claim One of the amended petition, Felix asserted for the first time the unexhausted claims that (1) the state court violated his right to due process and his right against self-incrimination by admitting into evidence his purportedly involuntary statements to the police and (2) he was denied effective assistance of counsel because his appellate attorney had failed to raise that claim.

Deneice A. Mayle ("the Warden") filed a motion to dismiss the "mixed" amended petition. (Pet. App. H5.) While that motion was pending, Felix exhausted Claim One in state court.

2. In ordering that the amended petition be filed within a specified period, the court noted that the petitioner already had the benefit of a few months to work on an amended petition, "if a substantive one is necessary." (Order filed on September 15, 1998.)

The Warden thereafter filed an answer to the fully exhausted amended petition. (Pet. App. C7; Pet. App. H8.)

On July 1, 2002, the district court denied the Confrontation Clause claim on the merits and denied the newly added claims relating to Felix's statements as barred by the AEDPA's statute of limitations. (Pet. App. C, D, H12-13.) The court explained that Felix's new involuntary statement claim did not "relate back" to the timely-filed petition under Federal Rule of Civil Procedure 15(c)(2) because the claim did not arise "out of the conduct, transaction, or occurrence set forth . . . in the original pleading." (Pet. App. D5-9.) The court observed that the involuntary statement claim and the Confrontation Clause claim did not arise from the "same core of facts," and noted that, "[o]bviously, the theories and facts of the claims are distinct." (Pet. App. D8-9.)

3. The United States Court of Appeals for the Ninth Circuit, in a 2-1 decision, reversed the district court's ruling that Claim One was time-barred. The majority explained that "a prisoner's new claim arises out of the same transaction or occurrence as his original petition because the transaction or occurrence in issue is his state trial and conviction."[3] (J.A. 8.) The court stated that "[w]e accordingly disagree, respectfully, with the decisions of several circuits that deny relation back under Rule 15(c)(2) when a new claim rests on a theory or facts within a trial not raised in the original habeas petition." (J.A. 11-12.)

---

3. The Ninth Circuit stated its agreement with *Ellzey v. United States*, 324 F.3d 521 (7th Cir. 2003). (J.A. 11.) In *Ellzey*, the Seventh Circuit addressed whether added arguments based on *Apprendi v. New Jersey*, 530 U.S. 466 (2000), related back to a timely-filed § 2255 motion that included a claim that counsel's performance with respect to sentencing was subpar. *Ellzey*, 324 F.3d at 525. The court concluded that the added arguments related back, stating that "[a] prisoner who comes up with ten different ways to contest his sentence still is litigating about a single transaction or occurrence (the supposedly unlawful sentence), so an amendment necessarily relates back under Rule 15(c)(2)." *Id.* at 525-26.

Responding to the other circuits' concern that its interpretation "would erode the effectiveness of AEDPA's one-year statute of limitations," the Ninth Circuit stated that the petitioner still must file his original petition within the limitations period. (J.A. 12.) The court opined that "precluding relation back of new claims effectively nullifies Rule 15(c)(2) in habeas proceedings," (J.A. 12), and suggested that Federal Rule of Civil Procedure 15(a) would serve to curb the abuse of the relation back doctrine. (J.A. 13.) The court also rejected the contention that its rule violates the policy of Rule 15(c) that the non-moving party have fair notice of the claims added by amendment. (J.A. 13-14.)

Judge Tallman dissented and expressed his agreement with the circuits that had rejected the broad application of the relation back doctrine to amended habeas petitions. He noted that "[t]he 'relation back' doctrine is not easily applied to habeas corpus petitions." (J.A. 17.) He observed that the majority obliterated the AEDPA period of limitations by defining "conduct, transaction, or occurrence" at such a "'high level of generality'" that "any claim stemming from pre-trial motions, the trial, or sentencing" would relate back to a timely-filed habeas petition. (J.A. 17-18.) Judge Tallman also found that the court's rule undermines the fair-notice policy underlying Rule 15(c), because "the original petition utterly failed to give fair notice to the State of the petitioner's new claim." (J.A. 20.) Judge Tallman instead endorsed the approach enunciated by the Eleventh Circuit in *Davenport v. United States*, 217 F.3d 1341, 1344 (11th Cir. 2000): "In order to relate back, the untimely claim must have arisen from the 'same set of facts' as the timely filed claim, not from separate conduct or a separate occurrence in 'both time and type.'" (See J.A. 19.)

SUMMARY OF ARGUMENT

Federal Rule of Civil Procedure 15(c)(2) allows a new claim in an amended pleading filed after a limitations period has expired to relate back to a timely filed pleading when the new claim arose out of the "conduct, transaction, or occurrence" as claims asserted in the original pleading. This case presents two choices as to how the "conduct, transaction, or occurrence" limitation of Rule 15(c)(2) applies to new claims amended to federal habeas corpus petitions. One option is that chosen by the Ninth Circuit, which construes "conduct, transaction, or occurrence" in a way that allows any new claim that stems from the petitioner's trial, conviction, and sentence to relate back under Rule 15(c)(2). The other option, adopted by numerous other courts of appeal and advocated by the Warden, is to construe "conduct, transaction, or occurrence" as the facts underlying the specific claims asserted in the original petition. Thus, for example, under the Ninth Circuit's rule, a new claim that the court left out an element of the offense in its instructions to the jury would relate back to an original claim that defense counsel had been ineffective in advising the defendant regarding a proffered plea bargain. Under the option advocated by the Warden, it would not.

1. The Ninth Circuit's rule is the wrong one for several reasons. First, defining Rule 15(c)(2)'s "conduct, transaction, or occurrence" so broadly as to include "any claim stemming from pre-trial motions, the trial, or sentencing" (J.A. 17), the Ninth Circuit has rendered the limiting parameters of the relation back rule meaningless in habeas cases. The exception would swallow the rule. Rule 15(c)(2) would essentially provide that all claims in a habeas corpus challenge to a conviction or sentence relate back to the original date of a timely filed habeas petition. This undermines the AEDPA one-year limitations period. AEDPA was enacted to reduce delay in the execution of state and federal judgments and to further promote the principals of comity, finality and federalism.

AEDPA's one-year statute of limitations reduces the potential for delay on the road to finality by restricting the time in which an inmate can seek federal habeas review. Yet under the Ninth Circuit rule, a habeas petitioner could file a minimal petition to serve as a "placeholder" to gain more time to develop claims, which the petitioner could then exhaust in state court before adding them to the federal petition. This renders the limitations period ineffective. It also facilitates piecemeal litigation and effectively allows the pendency of the federal petition to toll the limitations period, in direct contravention of *Duncan v. Walker*, 533 U.S. 167, 180-81 (2001).

Rule 11 of the Rules Governing Section 2254 ("Habeas Rule 11") provides that the Federal Rules of Civil Procedure "may be applied" only "to the extent they are not inconsistent with any statutory provisions or these rules." Because the Ninth Circuit's interpretation of Rule 15(c) undermines AEDPA's limitations period and tolling provision, and the policies that underlie them, Habeas Rule 11 proscribes that interpretation. The inconsistency between the Ninth Circuit's rule and AEDPA is not made irrelevant (as the Ninth Circuit asserted) by the district courts' discretion under Rule 15(a) to deny leave to amend petitions. Many amendments are allowed as of right; and as to others, Congress could not have intended the limitation period to apply at the discretion of district courts under Rule 15(a).

2. The Ninth Circuit's broad interpretation of "conduct, transaction, or occurrence" also violates Rule 15(c)'s underlying policy of giving fair notice of new claims. The Ninth Circuit's construction of Rule 15(c) wrongly assumes that the filing of an initial habeas petition puts states on notice of all possible claims stemming from the case. Given the wide variety of claims that can arise from a trial, conviction, and sentence, that assumption is utterly untenable—especially where, as here, the new claim had not even been exhausted in state courts at the time it was amended to the petition.

By contrast, the narrower interpretation of "conduct,

transaction, or occurrence" adopted by a number of circuits and advocated by the Warden is consistent with Rule 15(c)'s fair notice policy. It will not render Rule 15(c)(2) inapplicable in habeas corpus proceedings. It does not deny state prisoners their chance to present all their claims in federal court. It does, however, allow AEDPA's statute of limitations period to function effectively—*i.e.*, to preclude habeas petitioners from raising brand new claims based on a completely different set of facts after the statute of limitations has expired.

ARGUMENT

IN THE CONTEXT OF HABEAS CORPUS, FEDERAL RULE OF CIVIL PROCEDURE 15(c)(2) IS NOT PROPERLY READ TO ENCOMPASS ANY AND ALL CLAIMS THAT STEM FROM THE PRISONER'S TRIAL, CONVICTION, OR SENTENCE

A. The Ninth Circuit's Expansive Reading of Rule 15(c)(2) Significantly Undermines The Purposes Of AEDPA's Statute Of Limitations

While habeas corpus proceedings have been characterized as "civil," the "label is gross and inexact." *Harris v. Nelson*, 394 U.S. 286, 293-94 (1969). "Essentially, the proceeding is unique." *Id.* at 294. Unlike a typical civil case, which may first spring to life with the filing of a complaint in federal court, "[h]abeas corpus litigation is, by definition, a collateral attack on the finality of a criminal judgment following direct appeal or a conscious decision to forgo direct attack." (J.A. 17.) Accordingly, "habeas corpus is . . . not automatically subject to all rules governing ordinary civil actions." *Schlanger v. Seamans*, 401 U.S. 487, 490 n.4 (1971). Habeas Rule 11 provides that the Federal Rules of Civil Procedure apply to the

extent they are not inconsistent with any statutory provisions or the habeas rules. See also Fed. R. Civ. P. 81(a)(2).

Rule 15(c)(2), as construed by the Ninth Circuit, is precisely the sort of rule of civil procedure that Habeas Rule 11 contemplates not applying on habeas. From its inception, the purposes of the writ of habeas corpus "were tempered by a due regard for the finality of the judgment of the committing court." *Schneckloth v. Bustamonte*, 412 U.S. 218, 255-56 (1973) (Powell, J., concurring). This regard for finality was most recently advanced in AEDPA, which was designed to prevent federal habeas petitioners from unduly delaying the finality of their court judgments. *Woodford v. Garceau*, 538 U.S. 202, 206 (2003) ("Congress enacted AEDPA to reduce delays in the execution of state and federal criminal sentences, particularly in capital cases, . . . and 'to further the principles of comity, finality, and federalism' . . . .") (quoting *Williams v. Taylor*, 529 U.S. 420, 436 (2000)). One of the principal ways by which AEDPA sought to accomplish that objective was its creation of a one-year period of limitations, which is subject to tolling in specified circumstances.

The Ninth Circuit's so-called "literal" application of Rule15(c)(2) to habeas proceedings (J.A. 10) runs afoul of the principles which inform habeas corpus practice by undermining the limitations period and effectively rewriting the tolling provision. It thereby promotes delay in the finality of state court judgments. Habeas Rule 11 proscribes application of Rule 15(c)(2), so construed, to habeas proceedings.

Not surprisingly, then, a majority of circuits—the Third, Fourth, Eighth, Tenth, Eleventh and District of Columbia—have rejected the broad interpretation of "conduct, transaction, or occurrence" advanced by the Ninth Circuit.[4] These circuits

---

4. *E.g.*, *United States v. Hicks*, 283 F.3d 380, 389 (D.C. Cir. 2002); *Williams*, 263 F.3d at 1142; *McKay v. Puckett*, 255 F.3d 660 (8th Cir. 2001) (per curiam); *Espinoza-Saenz*, 235 F.3d at 505; *Davenport v. United States*, 217 F.3d 1341, 1346 (11th Cir. 2000); *Pittman*, 209 F.3d at 317-18; *United*

have followed a rule that is consistent with AEDPA, namely, limiting amendments to claims arising from the "same set of facts" as the timely filed claims, but prohibiting amendments with claims pertaining to events separate in "both time and type."[5/]

This Court should adopt that construction of Rule 15(c)(2).

1. The Ninth Circuit's Reading Would Allow Prisoners To Engage In An "End Run" Around The Statute Of Limitations By Belated Addition Of Unrelated And Untimely Claims To A "Placeholder" Petition

For state prisoners, AEDPA imposes a one-year period of limitations that runs from the finality of the state judgment (as it did in this case; Pet. App. C9-10), or from a later date under specified circumstances. 28 U.S.C. § 2244(d)(1)(A)-(D). In *Duncan v. Walker*, 533 U.S. at 179, this Court explained the objectives of the statute of limitations:

States v. Duffus, 174 F.3d 333, 335-38 (3rd Cir. 1999); *United States v. Craycraft*, 167 F.3d 451, 457 (8th Cir. 1999). There appears to be a split of authority within the Seventh Circuit. In *Rodriguez v. United States*, 286 F.3d 972 (7th Cir. 2002), a case decided before *Ellzey*, the Seventh Circuit noted cases that expressed the majority view regarding the relation back rule before concluding that the "issues and facts" underlying a new claim sought to be added by amendment did not relate back to the ineffective assistance of counsel claims asserted in the original petition. *Id.* at 980-81.

5. Accordingly, the Warden does not contend that Rule 15(c)(2) never applies to habeas petitions. 28 U.S.C. § 2242 ("Application for a writ of habeas corpus . . .. may be amended or supplemented as provided in the rules of procedure available to civil actions.").

> The 1-year limitation period of § 2244(d)(1) quite plainly serves the well-recognized interest in the finality of state court judgments. . . . This provision reduces the potential for delay on the road to finality by restricting the time that a prospective federal habeas petitioner has in which to seek federal habeas review.

Rule 15(c) sets forth a relation back rule "to ameliorate the effect of the statute of limitations." 6A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 1497, at 85 (2d ed. 1990). The rule does so, however, not by shielding *all* new claims from the limitations periods, but by shielding only a specified set of new claims. Under Rule 15(c)(2), "amendment of a pleading relates back to the date of the original pleading when . . . the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading." Fed. R. Civ. P. 15(c); *see Farris v. United States*, 333 F.3d 1211, 1215 (11th Cir. 2003) ("Congress intended Rule 15(c) to be used for a relatively narrow purpose. . . ."); *Fuller v. Marx*, 724 F.2d 717, 720 (8th Cir. 1984) (Rule 15(c) does not contemplate depriving the responding party of the protection of the statute of limitations).

By broadly interpreting Rule 15(c)(2)'s "conduct, transaction, or occurrence" to allow relation back of "any claim stemming from pre-trial motions, the trial or sentencing" (J.A. 17), the Ninth Circuit has stretched the limiting parameters of the relation back rule past the breaking point. It is difficult to imagine a claim made in a habeas corpus petition challenging a conviction or sentence that will not relate in some fashion to the trial, conviction or sentence. Thus, under the Ninth Circuit's rule, there are no restrictions to the relation back of claims for these habeas cases—*all* new claims will relate back to a timely-filed petition. This takes the "teeth" out of AEDPA's statute of limitations by giving prisoners the right to assert claims on habeas years after direct review has ended.

The Ninth Circuit apparently does not dispute that its interpretation of Rule 15(c)(2) would allow relation back of virtually all claims in habeas proceedings. The court justified this outcome by observing that AEDPA requires the filing of a petition within the one-year limitation period, meaning there still has to be a timely petition to which a new claim can relate back. (J.A. 12.) That response is wholly inadequate. The requirement of filing a timely petition would no longer serve the purposes of AEDPA (to reduce delay and to promote finality) if federal habeas proceedings could then be stalled by the addition of new—and possibly unexhausted—claims after expiration of the statute of limitations. The Ninth Circuit's holding would allow a habeas petitioner to file a "placeholder" petition within the limitations period merely to keep the door open, allowing him to take additional time to develop other claims to add into his petition without having to worry about a future time bar. It lets a habeas petitioner do an "end run" around the statue of limitations and renders it ineffective.

Judge Wilkinson aptly summed up the problem in *United States v. Pittman*, 209 F.3d 314, 317-18 (4th Cir. 2000):

> The fact that amended claims arise from the same trial and sentencing proceeding as the original motion does not mean that the amended claims relate back for purposes of Rule 15(c). If we were to craft such a rule, it would mean that amendments to a § 2255 motion would almost invariably be allowed even after the statute of limitations had expired, because most § 2255 claims arise from a criminal defendant's underlying conviction and sentence. Such a broad view of "relation back" would undermine the limitations period set by Congress in the AEDPA.

See also United States v. Espinoza-Saenz, 235 F.3d 501, 505 (10th Cir. 2000) ("because a majority of amendments to § 2255 motions raise issues which relate to a defendant's trial and sentencing, to allow amendment under the broad umbrella

would be tantamount to judicial rescission of AEDPA's statute of limitations period").[6]

2. The Ninth Circuit's Reading Effectively Nullifies This Court's Construction Of AEDPA's Tolling Provision, 28 U.S.C. § 2244(d)(2), In *Duncan v. Walker*

The overly broad relation back rule adopted by the Ninth Circuit is also contrary to this Court's specific holding in *Duncan v. Walker*. In *Duncan*, this Court held that the filing of an application for federal habeas corpus review did not toll the limitations period during the pendency of the state prisoner's first federal habeas petition. 533 U.S. at 181-82. The Court observed that a contrary position "would further undermine the interest in finality by creating more potential for delay in the adjudication of federal law claims." *Id.* at 180. Elaborating, the Court explained:

> A diminution of statutory incentives to proceed first in state court would also increase the risk of the very piecemeal litigation that the exhaustion requirement is designed to reduce. . . . We have observed that "strict enforcement of the exhaustion requirement will encourage habeas petitioners to exhaust all of their claims in state court and to present the federal court with a single habeas

---

6. The Ninth Circuit correctly noted that the reasoning expressed in federal inmate cases under 28 U.S.C. § 2255 applies equally to cases that challenge state convictions under 28 U.S.C. § 2254. (App. A4 n.1; *accord*, *Woodward v. Williams*, 263 F.3d 1135, 1142 (10th Cir. 2001) (in applying *Espinoza-Saenz*, 235 F.3d 501, to a state prisoner petition under 28 U.S.C. § 2254, the court stated, "we see no reason to treat the issue differently"); *see also United States v. Cicero*, 214 F.3d 199, 203 n* (D.C. Cir. 2000) ("Courts have generally applied the same analysis to the time limitations in § 2254 and § 2255").

> petition." . . . But were we to adopt respondent's construction of § 2244(d)(2), we would dilute the efficacy of the exhaustion requirement in achieving this objective. . . .

Id. AEDPA's purpose, and various provisions therein, "encourage litigants to *first* exhaust all state remedies and *then* to file their federal habeas petition as soon as possible." *Id.* at 181. The Ninth Circuit rule defeats that purpose.

While the Ninth Circuit's rule does not explicitly provide that the filing of a federal habeas petition tolls the period of limitations, an outcome rejected by *Duncan*, it effectively does the same thing. Under the Ninth Circuit rule, a habeas petitioner who files a timely initial federal habeas petition gains additional time to develop more claims; the habeas petitioner can go back to state court to exhaust the newly developed claims and thereafter raise them in federal court by adding them into his federal habeas petition after AEDPA's limitations period has already expired. And there is no statutory limit to the number of times this can be done. The habeas petitioner can use the federal district court as a "parking spot" while he bypasses the period of limitations with new claims. Such application of Rule 15(c)(2) permits the type of piecemeal litigation criticized in *Duncan*. It thus undermines the interest in finality "by creating more potential for delay in the adjudication of federal law claims." *Duncan*, 533 U.S. at 180.

The Ninth Circuit posits that a state prisoner has "very considerable incentive" to file all of his claims in the original petition or as soon as possible thereafter because a delay may result in final judgment being entered on the unamended petition. (J.A. 12 n.2.) But as Judge Tallman pointed out in his dissent, "the court underestimates the amount of time required by our district judges to consider and resolve habeas petitions." (J.A. 19 n.2.) A Department of Justice study shows that, on average, it takes 477 days to dispose of a habeas petition on the merits. See U.S. Dept. of Justice, Office of Justice Programs,

Bureau of Justice Statistics, Federal Habeas Corpus Review: Challenging State Court Criminal Convictions 23-24 (1995); *Duncan*, 533 U.S. at 186 (Breyer, J., dissenting) (noting that same study shows that "of all habeas petitions, nearly half were pending in the district court for six months or longer; 10% were pending more than two years"). It cannot be presumed that state inmates are unaware that federal habeas petitions take considerable time to resolve.

Here, Felix filed an amendment to his original petition, which contained an unexhausted claim. That resulted in the filing of a motion to dismiss, which thereafter became moot when the state court denied Felix's claim. (Pet. App. C6-7.) Whether it was Felix's intent, the amendment and exhaustion process delayed the filing of an answer to his petition.[7] *See Duncan*, 533 U.S. at 186 (Breyer, J., dissenting) (noting that the above-mentioned Justice Department study reflects that "on the average, district courts took 268 days to dismiss petitions on procedural grounds").

As this Court observed in *Pliler v. Ford*, ___ U.S. ___, 124 S. Ct. 2441, 2446 (2004), "it is certainly the case that not every litigant seeks to maximize judicial process." Delay works to the advantage of a condemned inmate whose only viable challenge is to the validity a capital sentence. *See Pliler v. Ford*, 124 S. Ct. at 2451 (Breyer, J., dissenting) (observing that "[t]hose under a sentence of death might welcome delays"). Application of Rule 15(c)(2) to allow all claims arising from a condemned inmate's trial, conviction or sentence to relate back to a timely filed petition will give such condemned inmates incentive to practice piecemeal litigation for purposes of delay. And delay in challenges to state convictions, especially in capital cases, is exactly what AEDPA was intended to eliminate. *Garceau*, 538 U.S. at 206.

---

7. In this case, the exhaustion process took over three-and-one-half months. (Pet. App. C7.)

3. Contrary To The Ninth Circuit's Contention, The Effectuation Of Congress' Purpose In Enacting AEDPA's Statute of Limitations Cannot Be Left To The Discretion Of District Judges Under Rule 15(a)

The Ninth Circuit implicitly recognized that its broad holding was problematic when it echoed *Ellzey's* assurance that "abuses of Rule 15 can be controlled by the district court under subsection (a), which requires leave of court to file an amendment after a responsive pleading has been filed." (J.A. 13.) Rule 15(a) does nothing, however, to relieve the inconsistency between Rule 15(c)(2), as interpreted by the Ninth Circuit, and AEDPA.

As an initial matter, Rule 15(a) allows a party to amend its pleading as of right "at any time before a responsive pleading is served." Fed. R. Civ. P. 15(a). When a new claim is added through an amendment as of right, Rule 15(a) does *not* give the district court the power to control "abuses of Rule 15." And such amendments are common in habeas corpus proceedings.

When the district court appoints counsel, as in this case (Pet. App. C6), the habeas petitioner will almost certainly be able to file an amended petition before a responsive pleading is due. Moreover, a motion to dismiss for failure to exhaust all claims does not count as a responsive pleading under Rule 15(a). 3 J. Moore et al., *Moore's Federal Practice* § 15.11, at 15-15, 15-16 (3d ed. 2004). And in the Ninth Circuit and the Seventh Circuit, where *Ellzey* was decided, a habeas petitioner would be able to amend his initial petition as a matter of course even after the court granted a motion to dismiss, so long as there was no final judgment. 3 J. Moore, et al., *Moore's Federal Practice* § 15.12[1], at 15-16.2 (3d ed. 2004) (citing *Mayes v. Leipziger*, 729 F.2d 605, 607-08 (9th Cir. 1984) and *Camp v. Gregory*, 67 F.3d 1286, 1289 (7th Cir. 1995)).

The Ninth Circuit's reliance on Rule 15(a) is equally flawed with respect to amendments submitted after a responsive

pleading has been filed. Rule 15(a) directs the court to allow leave to amend in such instances "when justice so requires." Fed. R. Civ. P. 15(a). "The policy in favor of allowing amendments is extremely liberal." 3 J. Moore et. al., *Moore's Federal Practice* § 15.14[1], at 15-27, 15-28 (3d ed. 2004). "In the absence of any apparent or declared reason--such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, *futility of amendment*, etc.--the leave sought should, as the rules require, be 'freely given.'" *Foman v. Davis*, 371 U.S. 178, 182 (1962) (emphasis added).[8]

Nowhere in AEDPA, however, is it suggested that Congress intended its limitations period to apply at the discretion of district courts under Rule 15(a). Under the Ninth Circuit's reasoning, district courts no longer need to be concerned with Rule 15(c) when applying Rule 15(a); district court will have the discretion to allow virtually every new claim to be added, regardless of their lack of relation to the claims in the original petition. All of the problems discussed in §§ (A)(1) and (A)(2), *supra*, will therefore come to fruition under the "extremely liberal" amendment policy of Rule 15(a), lessened only by the district court's occasional decision not to allow an amendment. That certainly is not the scheme envisioned by Congress. Rule 15(c)(2), as construed by the Ninth Circuit, remains fatally inconsistent with AEDPA.

---

8. "A district court may properly deny a motion to amend as futile if the proposed amendment would be barred by the statute of limitations." *Rodriguez*, 286 F.3d at 980; *see Moore v. Baker*, 989 F.2d 1129, 1131-32 (11th Cir. 1993) (lower court did not abuse discretion by denying leave to amend because the amended complaint containing new claims did not relate back to the original complaint and could not withstand a motion to dismiss on statute of limitation grounds).

B. Unlike The Ninth Circuit's Approach, The Warden's Interpretation Of Rule 15(c)(2) Is Consistent With The Rule's Proper Application In Ordinary Civil Cases

Properly construed, Rule 15(c)(2) does not allow relation back of every amended claim. Rather, it limits the set of claims that relate back to those which arose from the same "conduct, transaction, or occurrence" as a claim in the initial, timely pleading. The Ninth Circuit's interpretation of Rule 15(c)(2)'s application in habeas proceedings, however, vitiates that limitation, for it allows *all* amended habeas claims to relate back. This alone is enough to establish that it is an erroneous construction of the rule. But another fundamental reason exists as to why the Ninth Circuit's construction is wrong, and the Warden's is correct. Only the Warden's construction of Rule 15(c)(2) is consistent with the fair-notice policy underlying the rule and, thus, only the Warden's construction is consistent with how the rule applies in other civil contexts.

1. The Ninth Circuit's Reasoning Conflicts With The Policy Of "Fair Notice" That Informs The Relation Back Doctrine

In demarcating that narrow set of claims that relate back under Rule 15(c)(2), the key inquiry is "whether the opposing party has been put on notice regarding the claim or defense raised by the amended pleading. . . . A failure of notice will prevent relation back." 6A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure*, § 1497, at 85-86, 89 (2d ed. 1990); 3 J. Moore et al., *Moore's Federal Practice* § 15.19[2], at 15-83, 15-84 (3d ed. 2004) (factors a court should consider in determining whether a claim arose from the same conduct, transaction or occurrence include: (1) whether defendant had notice of the claim that plaintiff is now asserting; (2) whether

plaintiff will rely on the same kind of evidence offered in support of the original claim to prove the new claim; and (3) whether unfair surprise to defendant would result if the court allowed the amendment to relate back). This Court recognized the role of fair notice in Rule 15(c) in *Tiller v. Atlantic Coast Line R. Co.*, 323 U.S. 574 (1945), a case relied on by Felix in his Brief in Opposition (at 10-11).

a. The "Fair Notice" Policy Has Arisen In Civil Contexts To Illuminate The Parameters Of The Relation Back Doctrine

In *Tiller*, 323 U.S. 574, an action was brought against a railroad by the wife of a railroad employee who was killed on the job when a railroad car struck him. At issue was whether the three-year limitation period provided by the Federal Employers' Liability Act (FELA), the initial basis for the wife's suit, barred an amended claim resting on the Boiler Inspection Act. *Id.* at 580-81. The Court determined that the amended complaint, which charged the railroad with failing to have the locomotive properly lighted, related back to the original complaint, which alleged liability under FELA based on the railroad's failure to provide a proper lookout for the deceased, give him proper warning of the approach of the train, keep the head car properly lighted, and warn the deceased of an unprecedented and unexpected change in the manner of shifting cars. *Id.* at 577, 581.

The Court determined that "[t]here is no reason to apply a statute of limitations when, as here, the respondent has had notice from the beginning that petitioner was trying to enforce a claim against it because of the events leading up to the death of the deceased in respondent's yard." *Id.* at 581. *Tiller* thus establishes that this Court long ago recognized the importance of fair notice in applying Rule 15(c).

Moreover, *Tiller* exemplifies that, in effectuating this fair notice objective, the facts underlying the specific claim provide the proper level of generality in determining the "conduct, transaction, or occurrence" to which Rule 15(c)(2) refers. In *Tiller*, the core facts supporting the original claims also supported and provided notice of the new claim—both related to the proper lighting of the train.

Courts applying Rule 15(c)(2) in a variety of civil contexts have similarly looked to the facts underlying the specific claims when determining whether a new claim's "conduct, transaction, or occurrence" were set forth in the initial pleading. The Ninth Circuit and other courts have accordingly found insufficient notice in some cases even where the new claim and the earlier claim both stemmed from the event that gave rise to the cause of action, such as termination of employment. For example, in *Percy v. San Francisco General Hosp.*, 841 F.2d 975, 977-79 (9th Cir. 1988), the court determined that an amended complaint under 42 U.S.C. § 1983, alleging denial of due process in the Civil Service Commission hearing that resulted in Percy's termination did not relate back to his original claim of racial discrimination in his termination. Similarly, in *Nettis v. Levitt*, 241 F.3d 186, 193 (2d Cir. 2001), the court held that a terminated employee's allegation that his employer retaliated against him after he objected to the discontinuation of sales-tax collection did not relate back to his original complaint, which alleged that the employer had retaliated after the employee made a report of financial wrongdoing and theft by co-workers.

The same result has obtained in non-employment related actions. *See, e.g., Moore v. Baker*, 989 F.2d 1129, 1130-32 (11th Cir. 1993) (patient's claims that surgeon was negligent during and after coronary surgery did not arise out of the same "conduct, transaction, or occurrence" as claim set forth in original complaint, *viz.*, that doctor failed to inform the patient before obtaining her consent for surgery that there was an available alternative to the surgery); *Fuller v. Marx*, 724 F.2d at 720-21 (new claim of a cover up by the medical examiner did

not relate back to an earlier complaint alleging a negligently performed autopsy, even though both claims arose from the same autopsy).

b. The Ninth Circuit's Sweeping Interpretation Of Rule 15(c)(2) Is Inconsistent With The "Fair Notice" Policy

The filing of an initial habeas corpus petition to contest a criminal judgment on one ground does not put the opposing party on fair notice of all the possible claims stemming from pre-trial motions, the trial, or sentencing. For example, it is not reasonable to conclude that the filing of a habeas petition that contains a single claim of instructional error provides fair notice of, *inter alia*, any of the following types of claims:

- a speedy trial violation
- malicious prosecution
- improper exercise of a peremptory challenge against a juror
- ineffective assistance of counsel for failure to give proper plea advice
- incompetency to stand trial
- erroneous admission of evidence
- shackling
- jury misconduct
- cruel and unusual punishment

Yet, under the Ninth Circuit's overly generalized relation back doctrine, the State would be deemed to have notice of all of these potential claims simply because a prisoner had filed a petition raising a single claim of instructional error. That is unrealistic. A habeas petitioner would be relying on one set of facts in the trial record to support the initial claim of

instructional error and on an entirely different set of facts or evidence to prove any of the above-mentioned new claims. Further, it is also possible that the evidence in support of a new claim relies on evidence that is not even part of the record of the trial, such as when the petitioner claims that his trial attorney failed to provide effective assistance of counsel because the attorney was racially biased against him. The state cannot anticipate such a claim. Given the underlying policy of Rule 15(c), the "conduct, transaction, or occurrence" in habeas proceedings that challenge a criminal judgment are the underlying facts of a specific claim.

In this case, the Ninth Circuit focused on the fact that Felix's Confrontation Clause claim and his involuntary statements claim are both predicated on the admission of evidence at trial rather than on conduct prior to trial, which had allegedly rendered the evidence inadmissible. (J.A. 13.) Again, the fact that the claims arose from the same trial does not satisfy the underlying policy of fair notice. Even focusing on the admission of evidence, a challenge to the admission of one specific piece of evidence does not mean the opposing party has fair notice of a challenge to an entirely different piece of evidence. There are simply too many pieces of evidence in a given criminal trial to warrant such a rule.

Felix's initial petition included a claim that the trial court improperly admitted portions of a videotaped interview given by Kenneth Williams on February 4, 1994, based on an asserted violation of Felix's right to confront witnesses. That did not provide fair notice that Felix would subsequently add a new claim that Detective Gardner's testimony regarding Felix's allegedly involuntary statements on October 28, 1993, violated Felix's rights to due process and against self-incrimination. (Compare Pet. App. G and Pet. App. I.) The initial petition likewise did not give fair notice that Felix would later raise a claim of ineffective assistance of appellate counsel based on a failure to assert the involuntary statement claim on appeal. The district court correctly determined that the new involuntary

statement claim arose out of a different "core of facts," and therefore did not relate back to the initial petition. (Pet. App. B, D7-9.)

Lack of notice has been the basis for other circuits' rejection of the Ninth Circuit's broad interpretation of the "conduct, transaction, or occurrence" language of Rule 15(c)(2) in habeas proceedings. *See, e.g., Hicks*, 283 F.3d at 389 (relation back allowed only where original motion provides adequate notice of new claims); *Craycraft*, 167 F.3d at 457 (original petition did not provide sufficient notice of different claim of ineffective assistance of counsel). As Judge Edwards wrote for the D.C. Circuit in *Hicks*:

> [W]hile an amendment offered for the purpose of adding to or amplifying the facts already alleged in support of a particular claim may relate back . . . one that attempts to introduce a new legal theory *based on facts different from those underlying the timely claims* may not . . . . These principles are faithful both to the underlying purposes of Rule 15(c) and to the concerns about drawn-out and unlimited collateral attacks on federal criminal judgments evinced by the passage of AEDPA. They ensure that relation back will be allowed only where the original motion provides adequate notice of the prisoner's claims and that proposed amendment would neither change the fundamental nature of those claims nor prejudice the Government's defense by requiring it to prepare its case anew. . . .

283 F.3d at 388-89 (emphasis added).

The absence of fair notice under the Ninth Circuit rule is particularly acute when the new claim sought to be added to the initial petition was not asserted either on direct appeal or on one or more rounds of post-conviction review in state courts. This Court has long held that any petition containing even one claim that has not been exhausted in state court must be dismissed.

Pliler v. Ford, 124 S. Ct. at 2444 (citing *Rose v. Lundy*, 455 U.S. 509 (1982)); see 28 U.S.C. § 2254(b)(1). "A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement." 28 U.S.C. § 2254(b)(3). Absent an express waiver, the State can be confident that the federal court will apply the exhaustion requirement and can expect that any claim to be addressed in federal court will first be raised in state court on direct appeal or on post-conviction review. Accordingly, if a specific claim is not raised in state court, there is no reason for the State to anticipate that the specific claim will be raised in federal court. *Cf. Wilson v. Fairchild Republic Co., Inc.*, 143 F.3d 733, 739 & n.6 (2d Cir. 1998) (not an abuse of discretion to hold that opposing party did not have fair notice of new claim because the new claim had not been administratively exhausted and thus could not have been properly included in the original pleading).

The State's reliance on the exhaustion requirement is thus an additional consideration in determining if the State was put on fair notice of new claims. Where, as in this case, a newly asserted and unexhausted claim is based on different legal theories and stems from different facts than those underlying the original claim, it cannot reasonably be concluded that the State had fair notice of that new claim.

This refutes the Ninth Circuit's assertion that "[i]t unduly strains the usual meaning of 'conduct, transaction and occurrence' to regard a criminal trial as a series of perhaps hundreds of individual occurrences." (J.A. 11 (citing *Ellzey*, 324 F.3d at 526 ("this is not how the phrase 'conduct, transaction, or occurrence' is used in civil practice")). Quite the contrary, such a construction is compelled by the policy of ensuring fair notice. According to the Ninth Circuit, Felix's initial petition brought his trial and conviction to the attention of the State, and therefore the State could anticipate an amended pleading containing any and all additional claims of constitutional error that could arise from any part of that trial.

(See J.A. 14.) But this would afford little or no notice at all of the belated claims. A habeas action is about whether a constitutional right was violated–and in any trial, any number of constitutional rights may be implicated by any one of a number of transactions, occurrences, or courses of conduct.

2. The Idea Of "Same Transaction," As Used To Address Issues Of Res Judicata And Compulsory Joinder In Civil Proceedings, Is Inappropriate In The Context Of Habeas Corpus Proceedings

The Ninth Circuit relied on the following reasoning from *Ellzey*:

> [T]he phrase "conduct, transaction, or occurrence" . . . sums up the "same transaction" approach to the law of preclusion (and thus to compulsory joinder): all legal issues and claims for relief arising out of a single transaction may (and often must) be raised together, and Rule 15(c) specifies that anything that would be barred, if not brought now, may be added and litigated. . . .

Ellzey, 324 F.3d at 526, *quoted in* J.A. 11. That argument fails on several levels.

First, *Ellzey's* statement as to what Rule 15(c) specifies is not reflected in the language of the rule and appears simply to be the court's own test for determining what constitutes "conduct, transaction, or occurrence." Second, a mechanical test for applying Rule 15(c) does not take into account the different purposes behind the law of preclusion, compulsory joinder, and the relation-back doctrine in Rule 15(c). It also does not consider the extent to which claim preclusion and compulsory joinder even apply to habeas proceedings.

"The related doctrines of res judicata (claim preclusion) and collateral estoppel (issue preclusion) are meant to protect

parties from having to relitigate identical claims or issues and to promote judicial economy." *Transaero, Inc. v. La Fuerza Aerea Boliviana*, 162 F.3d 724, 731 (2d Cir. 1998). The underlying purpose of compulsory joinder under Federal Rule of Civil Procedure 13(a) is "to enable the court to settle all related claims in one action, thereby avoiding a wasteful multiplicity of litigation on claims arising from a single transaction or occurrence." 6 C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 1409, at 46 (2d ed. 1990). Rule 15(c), however, addresses an altogether different concern.

> Because the rationale of the relation back rule is to ameliorate the effect of the statute of limitations, *rather than to promote the joinder of claims and parties, the standard for determining whether amendments qualify under Rule 15(c) is not simply an identity of transaction test*; although not expressly mentioned in the rule, the courts also inquire into whether the opposing party has been put on notice regarding the claim or defense raised by the amended pleading.

6A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 1497, at 85 (2d ed. 1990) (emphasis added; footnote omitted). The Ninth Circuit's overly broad reading of "conduct, transaction, or occurrence" in habeas proceedings would permit relation back of new claims that were totally unanticipated by the responding party.

Finally, "ordinary principles of res judicata do not apply in habeas corpus." *Lonchar v. Thomas*, 517 U.S. 314, 339 (1996) (Rehnquist, C.J., concurring); *see Felker v. Turpin*, 518 U.S. 651, 664 (1996) ("new restrictions on successive petitions constitute a modified res judicata rule").[9] And compulsory

---

9. Even if claims do not relate back under Rule 15(c)(2), a habeas petitioner will have a statutory right to present new claims in a current petition or in a successive petition under certain circumstances. See 28 U.S.C. § 2244(d)(1)(B), (C) & (D) (specifying circumstances under which the limitations period is deemed tolled); 28 U.S.C. § 2244(b)(2) (specifying circumstances under which a habeas petitioner may bring a second or successive petition).

joinder under Rule 13(a) has no apparent application to habeas corpus petitions that challenge a criminal judgment. Accordingly, the "same transaction" approach taken in claim preclusion and compulsory joinder should not influence the application of Rule 15(c)(2) to habeas proceedings.

3. The Warden's Interpretation Of Rule 15(c)(2), Does Not Nullify Application Of The Relation Back Doctrine To Habeas Proceedings

The Ninth Circuit's view that the narrower construction of Rule 15(c)(2) endorsed by the Warden would nullify the rule's applicability to habeas proceedings (see J.A. 11) is unfounded. The Warden's interpretation of Rule 15(c)(2) will allow relation back even if there are different claims, so long as they arise from the "same set of facts," "not from separate conduct or a separate occurrence in both 'time and type.'" *Davenport*, 217 F.3d at 1344. For example, in *Mandacina v. United States*, 328 F.3d 995, 1000-01 (8th Cir. 2003), the court held that since both the original and amended claims under *Brady v. Maryland*, 373 U.S. 83 (1963), related to evidence obtained by the same police department and were factually similar in both "time and type," the new *Brady* claim alleging that the government failed to disclose a particular report related back to the original motion. In *Woodward v. Williams*, 263 F.3d at 1142, the court held that a new claim that the trial court violated the petitioner's rights by not allowing him to introduce evidence that certain statements had been recanted related back to the petitioner's claim that his due process rights were violated when the court allowed the recanted statements to be introduced.

Moreover, courts generally "will allow relation back when the new claim is based on the same facts as the original pleading and only changes the legal theory." 3 J. Moore et al., *Moore's Federal Practice* § 15.19[2], at 15-82 (3d ed. 2004). Undoubtedly, there will be instances in which that will occur in habeas corpus proceedings. For example, the same core of facts may give rise to a defendant's challenge to admission of statements he made to police based on the Fifth Amendment right recognized in *Miranda v. Arizona*, 384 U.S. 436 (1966), and based on the Sixth Amendment right recognized in *Massiah v. United States*, 377 U.S. 201 (1964). *See e.g., Cahill v. Rushen*, 678 F.2d 791, 797 (9th Cir. 1982) (Wallace, J., dissenting) (describing circumstances in the case that gave rise to *Massiah* and *Miranda* claims). Assuming that the habeas petitioner asserted only one of those claims in a timely-filed petition, the rule advocated by the Warden would allow for relation back of the new claim.

CONCLUSION

The judgment of the court of appeals should be reversed.

Dated: February 15, 2005

Respectfully submitted,

BILL LOCKYER
Attorney General of the State of California

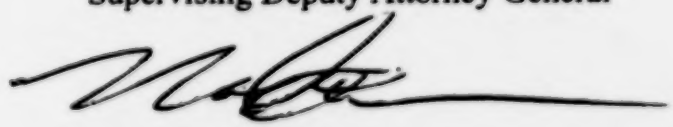
MANUEL M. MEDEIROS
State Solicitor General

ROBERT R. ANDERSON
Chief Assistant Attorney General

MARY JO GRAVES
Senior Assistant Attorney General

JANET E. NEELEY
Supervising Deputy Attorney General

WARD A. CAMPBELL
Supervising Deputy Attorney General



MATHEW CHAN
Deputy Attorney General
Counsel of Record

Counsel for Petitioner

APPENDIX

Section 2244 of Title 28 of the United States Code provides in pertinent part:

> (d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of --
>
> (A) the date on which the judgment became final by conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
>
> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

Section 2254 of Title 28 of the United States Code provides in pertinent part:

> (b)(1) An application for writ of habeas corpus on behalf

of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that–

(A) the application has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

. . . .

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

Rule 11 of the Rules Governing Section 2254 cases states:

The Federal Rules of Civil Procedure, to the extent that they are not inconsistent with any statutory provisions or these rules, may be applied to a proceeding under these rules.

Rule 13 of the Federal Rules of Civil Procedure states in pertinent part:

(a) Compulsory Counterclaims. A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction.

Rule 15 of the Federal Rules of Civil Procedure provides in pertinent part:

(a) Amendments. A party may amend the party's

pleading once as a matter of course at any time before a responsive pleading is served. . . . Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. . . .

. . . .

(c) Relation Back of Amendments. An amendment of a pleading relates back to the date of the original pleading when . . . ¶ (2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading . . . .

Rule 81of the Federal Rules of Civil Procedure provides:

(a) To What Proceedings Applicable. . . .

(2) These rules are applicable to proceedings for . . . habeas corpus . . . to the extent that the practice in such proceedings is not set forth in statutes of the United States, the Rules Governing Section 2254 Cases, or the Rules Governing Section 2255 Proceedings, and has heretofore conformed to the practice in civil actions.

Supreme Court, U.S.
FILED
MAR 2 2 2005
OFFICE OF THE CLERK

No. 04-563

IN THE SUPREME COURT OF THE UNITED STATES

DENEICE A. MAYLE, Warden,

Petitioner,

v.

JACOBY LEE FELIX

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT

QUIN DENVIR
Federal Defender
for the Eastern District of California

DAVID M. PORTER
Assistant Federal Defender
Counsel of Record

801 I Street, 3rd Floor
Sacramento, California 95814
(916) 498-5700
Counsel for Respondent

QUESTION PRESENTED

Whether two habeas claims arise from the same "conduct, transaction, or occurrence" under Federal Rule of Civil Procedure 15(c) when both claims challenge the same trial and conviction on the ground that the trial judge admitted into evidence extrajudicial statements in violation of the Constitution.

TABLE OF CONTENTS

Page

Question Presented i

Table of Authorities iv

Opinions Below 1

Jurisdiction 1

Relevant Statutory and Regulatory Provisions 1

Statement of the Case 4

Summary of Argument 9

Argument 10

I. The Facts of this Case Fit Comfortably Within the Plain Language of Civil Rule 15(c) and the Rule's Traditional Application in All Civil Contexts. 10

A. The "conduct, transaction, or occurrence" test is a broad one as evidenced by the rule's plain language, its history, and the policies animating it. 11

B. *Tiller*'s application of Civil Rule 15(c) is consistent with the rule's history and the policy animating it. 16

C. The coerced confession claim arose out of the same "conduct, transaction, or occurrence" as the initial application, as that term is traditionally applied in civil contexts, because both challenge the same trial and conviction.. 20

II. The Plain Language of 28 U.S.C. § 2242 Requires That Civil Rule 15(c) Be Applied in Habeas Proceedings As It Is in Other Civil Actions, and Renders Irrelevant the Warden's Policy-Based Arguments.. 25

A. Section 2242 requires that Civil Rule 15(c) be applied in habeas proceedings as it is in other civil actions. 26

B. The traditional application of Civil Rule 15(c) is consonant with the AEDPA limitation period.. 29

C. The district courts are vested with ample power to prevent abuses. 31

Conclusion 35

TABLE OF AUTHORITIES

Page(s)

Cases:

Albernaz v. United States, 450 U.S. 333 (1981) 27
Artuz v. Bennett, 531 U.S. 4 (2000) 20, 26
Baldwin County Welcome Center v. Brown, 466 U.S. 147 (1984) 20, 30
Barthel v. Stamm, 145 F.2d 487 (CA5 1944) 19
Buie v. Woolway, 2000 U.S. Dist. LEXIS 6183 (N.D. Ill. March 24, 2000) 14
Calderon v. Ashmus, 523 U.S. 740 (1998) 28
Cannon v. University of Chicago, 441 U.S. 677 (1979) 11
Carey v. Saffold, 536 U.S. 214 (2002) 34
Chavez v. Martinez, 538 U.S. 760 (2003) 9, 21
Coleman v. Thompson, 501 U.S. 722 (1991) 34
Duncan v. Walker, 533 U.S. 167 (2001) 28, 31
Ellzey v. United States, 324 F.3d 521 (CA7 2003) 8, 22, 26, 33
Fama v. Commissioner of Correctional Services, 235 F.3d 804 (CA2 2000) 29, 30
Federal Deposit Insurance Corp. v. Bennett, 898 F.2d 477 (CA5 1990) 12
Felker v. Turpin, 518 U.S. 651 (1996) 27
Foman v. Davis, 371 U.S. 178 (1962) 19, 32
Fuller v. Marx, 724 F.2d 717 (CA8 1984) 15
Grattan v. Burnett, 710 F.2d 160 (CA4 1983), *aff'd on other grounds*, 468 U.S. 42 (1984) 14
Griffin v. Rogers, ___ F.3d ___, 2005 U.S. App. LEXIS 3570 (CA6 March 3, 2005) 29
Lindh v. Murphy, 521 U.S. 320 (1997) 28
Lundy v. Adamar of New Jersey, 34 F.3d 1173 (CA3 1994) 19

Cases -- continued:

Miller v. American Heavy Lift Shipping, 231 F.3d 242 (CA6 2000) 14
Moore v. Baker, 989 F.2d 1129 (CA11 1993) 15
Moore v. New York Cotton Exchange, 270 U.S. 593 (1926) 12
Morton v. Mancari, 417 U.S. 535 (1974) 28
Nettis v. Levitt, 241 F.3d 186 (CA2 2001) 15
New York Central & Hudson River R. Co v. Kinney, 260 U.S. 340 (1922) 17, 20, 30
Newell v. Hanks, 283 F.3d 827 (CA7 2002) 26
O'Blasney v. Solem, 774 F.2d 925 (CA8 1985) 33
Pennsylvania v. Ritchie, 480 U.S. 39 (1987) 9, 21
Percy v. San Francisco General Hospital, 841 F.2d 975 (CA9 1988) 15
Railroad Telegraphers v. Railway Express Agency, Inc., 321 U.S. 342 (1944) 29
Rose v. Lundy, 455 U.S. 509 (1982) 31, 33
Rural Fire Protection Co. v. Hepp, 366 F.2d 355 (CA9 1966) 14
Schiavone v. Fortune, 477 U.S. 21 (1986) 19
Siegel v. Converters Transport, Inc., 714 F.2d 213 (CA2 1983) 14
Slack v. McDaniel, 529 U.S. 473 (2000) 34
Tiller v. Atlantic Coast Line R.R. Co., 323 U.S. 574 (1945) 12, 13, 24
U.S. Railroad Retirement Board v. Fritz, 449 U.S. 166 (1980) 27
United States v. Duffus, 174 F.3d 333 (CA3 1999) 22
United States v. Espinoza-Saenz, 235 F.3d 501 (CA10 2000) 22
United States v. Hicks, 283 F.3d 380 (CADC 2002) 22

Cases -- continued:

United States v. Memphis Cotton Oil Co., 288 U.S. 62 (1933) 17
United States v. Pittman, 209 F.3d 314 (CA4 2000) 22
United States v. Thomas, 221 F.3d 430 (CA3 2000) 29
Wainwright v. Sykes, 433 U.S. 72 (1977) 33
Whitfield v. United States, 125 S. Ct. 687 (2005) 29
Woodward v. Williams, 263 F.3d 1135 (CA10 2001) 22

Statutes:

Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, 110 Stat. 1214 6

Title 28, United States Code:
Section 1254(1) 1
Section 2072 26
Section 2241(c)(3) 23
Section 2242 ..... *passim*
Section 2243 32
Section 2244(d)(1)(A) 6, 21, 29, 33
Section 2254(b)(2) 34
Section 2266(b)(3)(B) 2, 10, 27, 33

Rules:

Federal Rules of Civil Procedure:
Rule 1 19
Rule 15(a) ..... *passim*
Rule 15(c) ..... *passim*
Rule 81(a)(2) 4, 25, 27

Rules -- continued:

Rules Governing Section 2254 Cases:
Rule 2 ..... 27, 33
Rule 4 ..... 4, 33
Rule 11 ..... 4, 25, 27

Legislative history:

Congressional Record, Volume 141:
S4591 28
S4596 28
S7486 28
S7488 28
S7610 28
S7657 28
S7662 28
S7666 28

H.R. Conf. Rep. 104-518, 94th Cong. 2d Sess. 111 (1996) 27
H.R. Rep. No. 308, 80th Cong., 1st Sess. A177-78 (1947) 26

Other materials:

Black's Law Dictionary (4th ed. 1951) 12
Charles E. Clark, *Handbook of the Law of Code Pleading* (2d ed. 1947) 18
Fleming James, Jr., Geoffrey C. Hazard, Jr., & John Leubsdorf, *Civil Procedure* (5th ed. 2001) 18
Lawyer's Cooperative Publishing, *Federal Procedure: Lawyers Edition* (1996) 24
James Wm. Moore, Daniel R. Coquillette, Gregory P. Joseph, *et al.*, *Moore's Federal Practice* (3d ed. 2004) 18

Other materials -- continued:

Benjamin J. Shipman, *Common-Law Pleading* (3d ed. 1923) 16
Charles Alan Wright, *The Law of Federal Courts* (4th ed. 1983) 16
Charles Alan Wright, Arthur Miller & Mary Kay Kane, *Federal Practice and Procedure* (2d ed. 1990) 17, 18, 19, 24
United States Department of Justice, Bureau of Justice Statistics, *Federal Habeas Corpus Review: Challenging State Court Criminal Convictions* (1995) 31

IN THE SUPREME COURT OF THE UNITED STATES

No. 04-563

DENEICE A. MAYLE, Warden,

Petitioner,

v.

JACOBY LEE FELIX

OPINIONS BELOW

The opinion of the court of appeals is reported at 379 F.3d 612. J.A. 5. The order of the district court, Pet. App. B, and the findings and recommendations of the magistrate judge, Pet. Apps. C & D, are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 9, 2004. The petition for a writ of certiorari was filed on October 25, 2004, and granted on January 7, 2005. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

RELEVANT STATUTORY AND REGULATORY PROVISIONS

Section 2244(d)(1), Title 28, United States Code, provides, in pertinent part, that:

> A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court . . . run[ning] from . . . the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review.

Section 2242, Title 28, United States Code, provides, in pertinent part, that an "[a]pplication for a writ of habeas corpus . . . may be amended or supplemented as provided in the rules of procedure applicable to civil actions."

Section 2266(b)(3)(b), Title 28, United States Code, relating to habeas corpus procedures in certain capital cases, provides that:

> No amendment to an application for a writ of habeas corpus under this chapter shall be permitted after the filing of the answer to the application, except on the grounds specified in section 2244(b).

Section 2244(b)(2), Title 28, United States Code, provides that:

> A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless --
>
> (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

> (B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
>
> (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

Rule 15 of the Federal Rules of Civil Procedure (hereafter "Civil Rule 15") provides, in pertinent part:

> (a) Amendments. A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served . . .. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires...
>
> . . . .
>
> (c) Relation Back of Amendments. An amendment of a pleading relates back to the date of the original pleading when . . . (2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set

forth in the original pleading.[1]

Civil Rule 81(a)(2) provides, in pertinent part, that the Civil Rules

> are applicable to proceedings for . . . habeas corpus . . . to the extent that the practice in such proceedings is not set forth in statutes of the United States, the Rules Governing Section 2254 Cases, or the Rules Governing Section 2255 Proceedings, and has heretofore conformed to the practice in civil actions.

Habeas Rule 4 provides, in pertinent part, that "[i]f it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court, the judge must dismiss the petition and direct the clerk to notify the petitioner."

Habeas Rule 11 provides, in pertinent part, that the Civil Rules "to the extent they are not inconsistent with any statutory provisions or these rules, may be applied to a proceeding under these rules."

STATEMENT OF THE CASE

1. During the course of a murder investigation, a detective from the Sacramento Police Department took two jailhouse statements, one from Mr. Felix and the other from Kenneth Williams. Pet. App. C8, C20. During Mr. Felix's trial in state court, the two statements were admitted over Mr.

---

1. References to the Federal Rules of Civil Procedure will be made as "Civil Rule __", and to the Rules Governing Section 2254 Cases as "Habeas Rule __."

Felix's objections during the prosecutor's case-in-chief. First, the prosecution showed a videotape of Kenneth Williams's statement after Williams was called to the stand and testified that he did not remember the statement he had given the police. RT 539. The court admitted Williams's videotaped statement over Mr. Felix's objection that it violated his right to confront the witness. RT 1217.

Second, the prosecution adduced testimony about Mr. Felix's statement during the direct examination of the investigating officer. This too was admitted over Mr. Felix's objection that the testimony violated his right to due process and his privilege against self-incrimination. CT 581-590; RT 722-732.[2]

---

2. Mr. Felix had filed an in limine motion to suppress his statement on the ground that it was coerced in violation of his privilege against self-incrimination. CT 581. At the hearing on the motion, the prosecutor acknowledged that "after a certain point in the interview, there is an express or implied promise of leniency that makes the rest of the statement beyond that point inadmissible." RT 25. The court ruled that the latter part of the statement was inadmissible, but it allowed the prosecution to use the first part of the statement. CT 591; RT 46.

In fact, there is nothing materially different about the coercive and intimidating tactics the police used in the latter part of the interrogation from the tactics employed before that point. Pet. App. I8-14. At trial, the prosecutor used the statements to place Mr. Felix at the scene of the crime at the time it was committed (RT 724, 727), tie him to Kenneth Williams (RT 725), and impeach his credibility RT 1031, 1033, 1039, 1040, 1046, 1049, 1052, 1062, 1092, 1109, 1110, 1115, 1116, 1119, 1122, 1123, 1124, 1128, 1134, 1136, the primary factor on which Mr. Felix's defense hinged.

Mr. Felix was convicted and sentenced to life imprisonment without the possibility of parole. On direct appeal, the state courts rejected Mr. Felix's claim that admission of Williams's statement violated his right to confront witnesses. Pet. App. E10-13. Mr. Felix's conviction became final on August 12, 1997. Pet. App. A5.

2. On May 8, 1998, Mr. Felix filed a timely pro se application for writ of habeas corpus in the United States District Court for the Eastern District of California asserting the same Confrontation Clause claim he had raised in state court. *Ibid.* On May 29, 1998, the court appointed the Office of the Federal Defender to represent Mr. Felix. Pet. App. H2. The one-year limitation period under the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, 110 Stat. 1214 (hereafter "AEDPA" or "the Act") expired on August 12, 1998. 28 U.S.C. § 2244(d)(1)(A). On September 15, 1998, following a scheduling conference, the magistrate judge permitted Mr. Felix to file an amended petition within thirty days. Pet. App. H3. On January 28, 1999, after several requests for extension of time that were unopposed by the Warden, Mr. Felix filed an amended federal petition as a matter of right under Civil Rule 15(a). Pet. App. H4-5; Pet. App. I. The amended petition included both the previously asserted Confrontation Clause claim and an additional claim that the state court had violated Mr. Felix's right to due process and his privilege against self-incrimination by admitting testimony about the coerced statements he made during the interrogation. Although the latter claim was not raised on direct appeal, Mr. Felix contended that appellate counsel was ineffective for having failed to raise it. Pet. App. A5. Mr. Felix also filed a petition for writ of habeas corpus asserting the coerced confession claim in the Supreme Court of California. Pet. App. D6.

On February 25, 1999, the Warden filed a motion to dismiss on the ground that the amended federal petition was

mixed because it contained both exhausted and unexhausted claims. Pet. App. H5. Mr. Felix filed several requests to continue the hearing on the motion, which were unopposed by the Warden and were granted by the court. Pet. App. H6, 7. On May 26, 1999, the state supreme court denied the exhaustion petition without comment or citation. Pet. App. C7; Answer, Attach. 8. The Warden thereafter withdrew her motion to dismiss and filed an answer responding on the merits to both claims of the amended petition and contending that the coerced confession claim should be dismissed as untimely. Pet. App. C8; Pet. App. H7, 8.

The district court issued an opinion ruling that the coerced confession claim did not relate back to the filing of the initial petition under Civil Rule 15(c) because it did not arise from the "same core of facts." Pet. App. D8. The court dismissed the coerced confession claim on the ground that it was time-barred by the one-year AEDPA statute of limitations. Pet. App. B2.

3. The Court of Appeals for the Ninth Circuit reversed. It held that because the claims in both the initial and amended petitions asserted that the Constitution was violated by admission of the statements at Mr. Felix's trial, both contentions arose from the same "conduct, transaction, or occurrence" as that term is used in Civil Rule 15(c). J.A. 10-11. The plain language of that rule, explained the court, should be applied literally according to its terms in habeas proceedings -- as it is in all other civil litigation. J.A. 10. The court concluded that the claims in this case fell comfortably within the rule because they asserted that the conviction was tainted by unconstitutional evidence introduced at the trial. The fact that each claim was based on a different legal theory did not mean that they arose from different "occurrences" under the rule. J.A. 11. Accordingly, the court concluded that the coerced confession claim related back to the filing of the initial application because both claims arose from "the same

transaction -- [Mr. Felix's] trial and conviction in state court." J.A. 10.

Following Judge Easterbrook's opinion for the Seventh Circuit in *Ellzey v. United States*, 324 F.3d 521 (2003), the court rejected the suggestion that for purposes of Civil Rule 15(c) a criminal trial and conviction should be parsed into a series of perhaps hundreds of individual occurrences, because that "'is not how the phrase "conduct, transaction, or occurrence" is used in civil practice.'" J.A. 11 (quoting *Ellzey*, 324 F.3d at 526). The court also rejected the Warden's argument that the claims involved different occurrences because Mr. Felix's statements were taken by the police more than three months before Williams's statements. This argument, the court explained, ignored the nature of Mr. Felix's habeas challenge: that the Constitution was violated not by the *taking* of the statements but by their *admission at trial*. It therefore refused to "look beyond the events of the trial to find the 'conduct, transaction, or occurrence' that is the subject of Felix's claims." J.A. 13.

The court dismissed the notion that its interpretation of the rule would obliterate the AEDPA's limitation period, because initial petitions would still have to be filed within the period. J.A. 12. A contrary interpretation -- one that precluded relation back of new claims -- would effectively nullify the rule in habeas proceedings because "[a] new 'claim' will nearly always rest on a legal theory, and often on a subset of facts within the larger transaction or occurrence, that differs from those underlying the claim asserted by the original pleading." J.A. 11, 12. With regard to the State's notice interest, the court held that the initial petition brought the trial and conviction to the attention of the State, which could therefore anticipate amendments challenging allegedly unconstitutional rulings at that trial. J.A. 14. Finally, it noted that any potential abuses of the relation back doctrine could be prevented through the district courts' application of Civil Rule 15(a), which requires

leave of court to file an amendment after a responsive pleading has been filed. J.A. 13.

SUMMARY OF ARGUMENT

The plain language of Civil Rule 15(c), which is applicable to habeas proceedings as provided in 28 U.S.C. § 2242, sets forth a broad test for when amended pleadings will relate back to the filing date of original pleadings. It provides that a claim will relate back when it arises from the same "conduct, transaction, or occurrence" set forth in the original pleading. The literal and usual meaning of each of these terms is expansive, and they have been so construed by the courts. This construction is consistent with the history of and the policies animating the Civil Rules in general, and Civil Rule 15(c) in particular.

Mr. Felix's coerced confession claim fits comfortably within this traditional application of Civil Rule 15(c). Both the coerced confession claim and the confrontation claim assert trial rights, and therefore the operative facts underlying both claims are that the trial court admitted the unconstitutional statements over Mr. Felix's objection during the prosecution's case-in-chief. That the statements were taken three months apart is irrelevant to the relation back issue, because Mr. Felix's constitutional rights were not violated when the statements were taken. The statements became "actionable" for habeas purposes only when they were admitted during the trial. See *Chavez v. Martinez*, 538 U.S. 760, 766 (2003); *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987). Accordingly, they share the same core of operative facts so that the latter claim would relate back to the filing of the initial petition even under the more restrictive test espoused by courts that have rejected the traditional test.

The circuit court's traditional application of Civil Rule 15(c) in the habeas context is consonant with the AEDPA

statute of limitations and the policy of fair notice. To prevail, the Warden must demonstrate that when Congress enacted the AEDPA it impliedly repealed 28 U.S.C. § 2242, the statute that specifically permits the amendment of pleadings "as provided in" Civil Rule 15. This she cannot do. In 28 U.S.C. § 2266(b)(3)(B), Congress addressed one of the primary concerns of the AEDPA's proponents -- the delay in federal *capital* habeas proceedings -- by severely restricting the right of petitioners from "opt-in" States who are under a sentence of death to amend their habeas petitions. The fact that Congress limited the right to amend in that particular category of cases and left unchanged Section 2242 of the Judicial Code is powerful evidence that it intended to preserve Civil Rule 15(c)'s application to habeas corpus proceedings alongside the new statute of limitations. Because the plain language of the statute requires the traditional application of Civil Rule 15(c) to habeas corpus proceedings, the Warden's policy concerns are irrelevant. District courts have ample authority, in any event, to prevent delay or abuse of the system.

ARGUMENT

This is a straightforward case involving the plain language of Civil Rule 15 and 28 U.S.C. § 2242. Civil Rule 15, expressly made applicable to habeas corpus proceedings by Section 2242, allows the liberal amendment of pleadings and provides that claims added to pleadings relate back to the original date of filing when they arise from the same "conduct, transaction, or occurrence." This phrase readily covers the claim added by Mr. Felix's amended habeas petition. The Warden's policy argument that the AEDPA has somehow worked an implied repeal of this controlling law should be rejected, and the court of appeals' judgment affirmed.

I.

The Facts of this Case Fit Comfortably Within the Plain Language of Civil Rule 15(c) and the Rule's Traditional Application in All Civil Contexts.

Traditionally, courts have applied Civil Rule 15 in a broad manner, consistent with its plain language, its history, and the policies behind that rule and the civil rules in general. It is against this backdrop that the Court must view Congress's enactment of the AEDPA and its new one-year statute of limitations on habeas actions. See *Cannon v. University of Chicago*, 441 U.S. 677, 696-97 (1979) (when construing statute, "[i]t is always appropriate to assume that our elected representatives . . . know the law"). Mr. Felix's two claims, challenging the trial court's admission of unconstitutional evidence during the prosecution's case-in-chief, arise from the same "conduct, transaction, or occurrence," as that term is traditionally applied, because they both emanated from the same state-court trial. Accordingly, the coerced confession claim relates back to the date of filing of initial application.

A. The "conduct, transaction, or occurrence" test is a broad one as evidenced by the rule's plain language, its history, and the policies animating it.

When Congress adopted Civil Rule 15(c), it spoke broadly. The rule provides, in pertinent part, that "[a]n amendment of a pleading relates back to the date of the original pleading when . . . (2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading." The test for relation back is stated in the disjunctive, so that a claim arising from either the same conduct, or the same transaction, or the same occurrence as the

claim either set forth or attempted to be set forth in the original pleading will meet the test. *Federal Deposit Ins. Corp. v. Bennett*, 898 F.2d 477, 479 (CA5 1990).

The plain, usual, and literal meaning of the terms is expansive, as one of the Warden's *amici* acknowledges. See Br. of the States 10 ("the flexible word 'occurrence' can be broadly construed to include a criminal trial"). "Conduct" is defined simply as "[p]ersonal behavior; deportment; mode of action; any positive or negative act." *Black's Law Dictionary* at 367 (4th ed. 1951).[2] "Occurrence" is defined as "[a] coming or happening; any incident or event, especially one that happens without being designed or expected." *Id.* at 1231. And Black's Law Dictionary specifically notes the definition of "transaction" in the context of the relation back doctrine as "properly embrac[ing] that combination of acts and events, whether in the nature of contract or tort, out of which a legal right springs, or upon which a legal obligation is predicated." *Id.* at 1668; see also *Moore v. New York Cotton Exchange*, 270 U.S. 593, 610 (1926) ("'[t]ransaction' is a word of flexible meaning. It may comprehend a series of many occurrences, depending not so much upon the immediateness of their connection as upon their logical relationship").

That the terms' usual meanings were to be given literal application is confirmed by this Court's decision in *Tiller v.*

---

2. To illuminate the traditional nature of the "conduct, transaction, or occurrence" test, we quote the fourth edition of *Black's Law Dictionary*, because its publication was roughly contemporaneous with the seminal interpretation of the test in *Tiller v. Atlantic Coast Line R.R. Co.*, 323 U.S. 574 (1945), discussed *infra*.

Atlantic Coast Line R.R. Co., 323 U.S. 574 (1945), which held that a claim will relate back when the original complaint alleges an injury, and the claim in the amended complaint alleges additional causes of that same injury. *Id.* at 581.

In *Tiller*, a widow filed a complaint following the death of her husband in a train accident, seeking relief under the Federal Employers' Liability Act (FELA). She alleged that her husband's employer, the railroad, had failed to provide a proper lookout for her husband, to give him proper warning of the approach of the train, to keep the head car properly lighted, and to warn him of an unprecedented and unexpected change in the manner of shifting cars. After the limitations period expired, she filed an amended complaint alleging that the railroad violated the Federal Boiler Inspection Act (Boiler Act) by failing to have a locomotive properly lighted. Even though the claims were based on different facts -- the FELA claim was based on, among other things, failure to keep the head car properly lighted, and the Boiler Act claim was based on failure to have a different car, the locomotive, properly lighted -- this Court held that the Boiler Act claim related back because both claims "related to the same *general* conduct, transaction, and occurrence which involved the death of the deceased." *Id.* at 581 (emphasis added). "The cause of action now," the Court explained, "as it was in the beginning, is the same -- it is a suit to recover damages for the alleged wrongful death of the deceased. . . . There is no reason to apply a statute of limitations when . . . the respondent has had notice from the beginning that petitioner was trying to enforce a claim against it because of the events leading up to the death of the deceased in respondent's yard."[3] *Ibid.*

---

3. Decisions of the lower courts confirm that, under *Tiller*'s application of Civil Rule 15(c), claims in amended pleadings, even if based on new facts, will nevertheless relate back if they arise from "events leading up to the same injury"

put at issue in the original pleading. See, *e.g.*, *Miller v. American Heavy Lift Shipping*, 231 F.3d 242, 248-49 (CA6 2000) ("[a]n amendment that alleges added events leading up to the same injury relates back"); *Siegel v. Converters Transp., Inc.*, 714 F.2d 213, 216 (CA2 1983) (per curiam) (amended complaint expanding time period under which shareholder could recover difference between freight rates paid by shipper and those listed by carrier related back to original complaint; "conduct" or "transaction" was not each shipment of goods at issue, but rather "the agreement [by defendants] to violate the tariff"); *Grattan v. Burnett*, 710 F.2d 160, 163 (CA4 1983) (discrimination claim made by two former college officials related back to original claim of arbitrary dismissal; "[b]oth [claims] concern the events leading up to their termination . . ., and in both the termination was the ultimate wrong of which they complained), *aff'd on other grounds*, 468 U.S. 42 (1984); *Rural Fire Protection Co. v. Hepp*, 366 F.2d 355, 361-62 (CA9 1966) (amended complaint sought damages for violations of Fair Labor Standards Act committed at different times than those alleged in original complaint); *Buie v. Woolway*, 2000 U.S. Dist. LEXIS 6183, *9-10 (N.D. Ill. March 24, 2000) ("In this case, as in *Tiller*, the plaintiff is seeking damages flowing from an accident outlined in the original complaint . . .. While the products liability and negligent rental claims are wholly separate from Buie's original negligence claim, they flow from the same root occurrence -- the accident"; "the key to the relation back doctrine is whether the new cause of action arises from the transaction or occurrence featured in the original complaint, not whether the original complaint contains factual allegations sufficient to support a subsequently raised cause of action").

The Warden relies on four circuit cases that look to the facts underlying the specific claims when applying the same conduct, transaction, or occurrence test. Two of those cases are

The Warden misreads *Tiller*, arguing that "the core facts supporting the original claims also supported and provided notice of the new claim -- both related to the proper lighting of the train." Pet. Br. 20. If the Warden were correct, the Court would not have described the "notice" that respondent had had from the beginning as "the *events* leading up to the death of the deceased," *ibid.* (emphasis added), but rather would have said "the improper lighting of the train."

A close reading of *Tiller* also exposes the Warden's error. At the first trial, the district court directed a verdict in favor of the railroad, but this Court reversed. At the second trial, the evidence regarding the movement of the cars was substantially the same as at the first, so this Court's opinion required the district court to submit the case to the jury and *would have* required the court of appeals to affirm the judgment in the plaintiff's favor *if* the plaintiff had rested on her complaint. But because her amended complaint added "a new item of negligence," *id.* at 576 (*viz.*, the locomotive was not properly lighted at the rear, as required by regulations promulgated pursuant to the Boiler Act), the court of appeals felt itself obliged to determine whether there was sufficient

distinguishable because they involved "an entirely new set of actors." See *Percy v. San Francisco General Hosp.*, 841 F.2d 975, 980 (CA9 1988) (the "first amended complaint implicated an entirely new set of actors who are alleged to have injured Percy"); *Nettis v. Levitt*, 241 F.3d 186, 193 (CA2 2001) (sales tax matter, which was subject of amended complaint, involved a dispute between the plaintiff and his employer, "whereas the allegations originally made involved a conflict between" the plaintiff and other individuals). The other two cases are contrary to *Tiller*, which neither case cites nor discusses. See *Moore v. Baker*, 989 F.2d 1129 (CA11 1993); *Fuller v. Marx*, 724 F.2d 717 (CA8 1984).

evidence to justify the submission of the new theory to the jury over the railroad's objection. The court held that there was no evidence that the Boiler Act violation had caused the decedent's death and ruled that a verdict should have been directed for the railroad.

This Court again reversed, holding that "[i]t was for the jury to determine whether the failure to provide this required light *on the rear of the locomotive* proximately contributed to the deceased's death." *Id.* at 578 (emphasis added). *Tiller* was not simply about "the proper lighting of the train," Pet. Br. 20; the amended complaint critically changed the focus of the action by asserting the "new item of negligence" that the locomotive was not lighted at the rear, yet it related back because it arose out of "the events leading up to the death of the deceased in respondent's yard." *Id.* at 581; see also Charles Alan Wright, *The Law of Federal Courts* § 66 (4th ed. 1983) (*Tiller* permitted relation back even though amended claim "was based on a different legal theory than was the original [claim] and rested on facts *not asserted originally*").

B. *Tiller*'s application of Civil Rule 15(c) is consistent with the rule's history and the policy animating it.

Tiller's application of Civil Rule 15(c) is consistent with the rule's history. When the Federal Rules of Civil Procedure were adopted in 1937, the relation back doctrine was already "well recognized." Fed. R. Civ. P.15, Advisory Committee Notes. The doctrine has its roots in former federal equity practice and many state codes, and is codified in Civil Rule 15(c)(2). Equity practice was broader than the strict common law pleading rules, which prohibited an amendment that attempted to introduce a new cause of action (for example, from trespass to trespass on the case, Benjamin J. Shipman, *Common-Law Pleading* § 163 at 294-96 (3d ed. 1923)). Fleming James, Jr., *Civil Procedure* § 6.3 at 159 (1965). By the early 1900's, this Court's broad interpretations of the "cause

of action" standard "widened the scope of permissible amendments in the federal courts as well as the applicability of the relation back doctrine . . .. The practice on the equity side of the federal courts was even more liberal and much of it subsequently was embodied in Rule 15." 6 Charles Alan Wright, Arthur Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1471 at 505 (2d ed. 1990) (hereafter "*Wright & Miller's Federal Practice*"); see *United States v. Memphis Cotton Oil Co.*, 288 U.S. 62, 68 (1933) (this Court "has fixed the limits of amendment with increasing liberality"); *New York Cent. & Hudson River R. Co v. Kinney*, 260 U.S. 340, 346 (1922) ("we are of opinion that a liberal rule should be applied"). Thus, while virtually all of Civil Rule 15's component parts were drawn from existing practice, see Fed. Eq. R.19, 28 & 34, the "overall effect of [Civil Rule 15] is an amendment policy that is more liberal than that permitted at common law or under the codes." 6 *Wright & Miller's Federal Practice* § 1471 at 505.

While, at the time of the adoption of the Civil Rules, the exact contours of the modern transaction test were still to be developed, three facts about Rule 15(c) were readily apparent. First, the new standard was designed to be more liberal than the common law "same cause of action" test. The modern standard eschewed the "wooden cause-of-action test" for determining the appropriateness of relation back: "No longer [was] a party to be irrevocably bound to the legal or factual theory of his first pleading." 6 *Wright & Miller's Federal Practice* § 1471 at 507.

Second, the new standard furthered the policy of litigating cases on their merits, rather than dismissing them on pleading technicalities, by broadening the right of a party to amend without incurring the bar of the statute of limitations.

Third, and most important for purposes of this case, the new standard anticipated and permitted factual variations, even

substantial ones, in the proof necessary to establish liability under the amended complaint as compared to the original complaint. 6A *Wright & Miller's Federal Practice* § 1497 at 94 ("judicial insistence on notice does not mean that the courts will bar relation back simply because the amended pleading deviates markedly from the original").[4]

Tiller's interpretation of the rule's plain language is not only consistent with its history, it is also consistent with Civil Rule 15's policy "to provide maximum opportunity for each claim to be decided on its merits rather than on procedural technicalities." 6 *Wright & Miller's Federal Practice* § 1471 at 505; see also 3 James Wm. Moore, Daniel R. Coquillette, Gregory P. Joseph, *et al.*, *Moore's Federal Practice* §15.02[1] at 15-9 (3d ed. 2004) (hereafter "*Moore's Federal Practice*") ("[t]he Rule allows for liberal amendment in the interests of resolving cases on the merits"). It also furthers Rule 15(c)'s policy "to ameliorate the effect of the statute of limitations." 6A *Wright & Miller's Federal Practice* § 1497 at 85; 3 *Moore's Federal Practice* § 15.02[2] at 15-10.[5] These policies, in turn, are in keeping with the goal of the civil rules in general, which is "to secure the just, speedy, and inexpensive determination of

---

4. *See also* Fleming James, Jr., Geoffrey C. Hazard, Jr., & John Leubsdorf, *Civil Procedure* § 4.23 at 278 (5th ed. 2001) (policies behind limitation period are not threatened by amendments "even when the new ground involves a variation in the facts"); Charles E. Clark, *Handbook of the Law of Code Pleading* § 118 at 731 (2d ed. 1947) ("unless there has been so great a change in the material operative facts that an entirely different fact situation is presented, the amendment should be allowed").

5. The *sole* purpose of the relation back doctrine is to overcome the limitation bar. 6 *Wright & Miller's Federal Practice* § 1496 at 64 n.4.

every action." Fed. R. Civ. P. 1; *Foman v. Davis*, 371 U.S. 178, 181-82 (1962). Indeed, after this Court narrowly construed the language in former Civil Rule 15(c)(3), regarding when an amendment that changes a party relates back, Congress overruled the decision. See Fed. R. Civ. P. 15, Advisory Comm. Notes 1991 Amendment ("[o]n the basis of the text of the former rule, the Court reached a result in *Schiavone v. Fortune*[, 477 U.S. 21 (1986)] that was inconsistent with the liberal pleading practices secured by Rule 8"); *Lundy v. Adamar of New Jersey*, 34 F.3d 1173, 1186 (CA3 1994) (Becker, J., dissenting) ("The fact that the result the Supreme Court reached in *Schiavone* led [Congress] shortly to amend the Rule is a sure reminder of the liberality of federal pleading practices. This liberality is expressed throughout the Rules and is enshrined in a long and distinguished history").[6]

This is not to say that all claims will relate back to the date of the filing of the initial pleading. The claim must arise out of the same "conduct, transaction, or occurrence," so that the responding party will be on notice "that the whole transaction described in [the suit] will be fully sifted, by amendment if need be, and that the form of action or the relief prayed or the law relied on will not be confined to their first statement." *Barthel v. Stamm*, 145 F.2d 487, 491 (CA5 1944) (quoted in 6A *Wright & Miller's Federal Practice* § 1497 at 93). As Justice Holmes explained for a unanimous court, "when a defendant has had notice from the beginning that the plaintiff sets up and is trying to enforce a claim against it because of specified conduct, the reasons for the statute of

---

6. In light of this "long and distinguished history" demonstrating the liberality with which the Civil Rules in general and Civil Rule 15(c) in particular are applied, the State *amici*'s contention that "courts and commentators have given Rule 15(c)(2) a relatively narrow scope," Br. of the States 3, should be rejected out of hand.

limitations do not exist, and . . . a liberal rule should be applied." *Kinney*, 260 U.S. at 346; see also *Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 149 n.3 (1984) ("rationale of Rule 15(c) is that a party who has been notified of litigation concerning a particular occurrence has been given all the notice that statutes of limitations were intended to provide").

C. The coerced confession claim arose out of the same "conduct, transaction, or occurrence" as the initial application, as that term is traditionally applied in civil contexts, because both challenge the same trial and conviction.

Under a plain reading of Civil Rule 15(c), Mr. Felix's challenge to the trial admission of his coerced confession claim arises from the same "conduct, transaction, or occurrence" as his challenge to the trial court's admission of Kenneth Williams's statement. Because both challenges allege deprivation of constitutional trial rights by the improper admission of extrajudicial statements, the later-filed claim relates back to the date of the timely filed application.[7]

---

7. The AEDPA requires only that "an application" for writ of habeas corpus be filed within the one-year limitation period. 28 U.S.C. § 2244(d)(1) ("A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court"). It is undisputed that Mr. Felix complied with the terms of the statute. The Warden has cited no statutory authority for the proposition that each *claim* in the application must be filed within the one-year limitation period. This Court rejected a State's request to apply a portion of the limitation statute the tolling provision in Section 2244(d)(2) on a claim-by-claim basis. *Artuz v. Bennett*, 531 U.S. 4, 9 (2000) ("[b]y construing 'properly filed application' to mean 'application raising claims

The privilege against self-incrimination is a *trial* right. In *Chavez v. Martinez*, 538 U.S. 760 (2003), the plaintiff was interrogated by a police officer, despite the fact that no *Miranda* warnings were given and the plaintiff, who repeatedly asked that the interrogation cease, was in the midst of receiving emergency medical treatment for life-threatening injuries. The plaintiff brought a civil rights action against the officer but, because the plaintiff was never charged with a crime and his statements were accordingly never used against him in any criminal trial, this Court held that the plaintiff was not deprived of his privilege against self-incrimination. Writing for a plurality, Justice Thomas explained that because the coerced statements were not used at a criminal trial, the plaintiff was not "'compelled in any criminal case to be a witness against himself.'" *Id.* at 766 (quoting U.S. Const., amend. V). Under *Martinez*, the operative fact of Mr. Felix's coerced confession claim is that his statements were used against him in his criminal trial.

The confrontation right violated by the admission of Williams's statement is likewise a *trial* right. In *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987), this Court rejected an interpretation of the Confrontation Clause that would have transformed it into a constitutionally compelled rule of pretrial discovery: "The opinions of this Court show that the right to confrontation is a *trial* right, designed to prevent improper restrictions on the types of questions that defense counsel may ask during cross-examination." *Id.* at 52 (plurality opn.) (emphasis in original). Under *Ritchie*, the operative fact of Mr. Felix's Confrontation Clause claim is that the statement was admitted during his criminal trial.

---

that are not mandatorily procedurally barred,' [the warden] elides the difference between an 'application' and a 'claim'").

When viewed in line with the Court's cases defining the nature of Mr. Felix's claims, both the coerced confession claim and the Confrontation Clause claim arise out of the same conduct, transaction, or occurrence as that phrase is used, and has been consistently applied, in the context of Civil Rule 15(c). They challenge the same conduct -- that of the trial judge -- in admitting the same type of evidence – statements adverse to Mr. Felix -- during the same transaction -- the prosecution's case-in-chief.

The claims are in fact so closely related that they even meet a more restrictive test created by decisions on which the Warden relies. See Pet. Br. 9 n.4.[8] Those decisions hold that a claim will not relate back if it is "totally separate and distinct, 'in both time and type' from those raised in [the] original motion." *United States v. Hicks*, 283 F.3d 380, 388 (CADC 2002) (quoting *United States v. Espinoza-Saenz*, 235 F.3d 501, 505 (CA10 2000)). The claims in this case, however, are not totally separate in both time and type; to the contrary, they

---

8. Some courts have created a test that was discarded when the Civil Rules were adopted, under which a claim will relate back "'if and only if . . . the proposed amendment does not seek to add a new claim or to insert a new theory into the case.'" *Woodward v. Williams*, 263 F.3d 1135, 1142 (CA10 2001) (quoting *Espinoza-Saenz*, 235 F.3d at 505)). This is not how Civil Rule 15(c) is used in civil practice. *Ellzey*, 324 F.3d at 525-26 (reading "'conduct, transaction, or occurrence' to refer to single events in a criminal proceeding – an objection to particular evidence, each aspect of a calculation under the Sentencing Guidelines, and so on . . . is not how the phrase . . . is used in civil practice"). Other courts have adopted a test that is contrary to *Tiller*, under which a claim will relate back only if it is based on "the same set of facts" as the timely filed claim, *United States v. Pittman*, 209 F.3d 314, 318 (CA4 2000); *United States v. Duffus*, 174 F.3d 333, 337 (CA3 1999).

arose on successive days during the trial and both challenged the unconstitutional admission of pretrial statements. Thus, even under this restrictive test, the confrontation clause claim relates back to the filing of the coerced confession claim.

The Warden's brief focuses almost exclusively on the Ninth Circuit's "interpretation" of Civil Rule 15(c)(2), rather than its application of the rule to the facts of this case. Pet. Br. 21. She argues that the filing of an initial habeas corpus petition does not put the opposing party on fair notice of "all possible claims" stemming from pre-trial motions, the trial, or sentencing, and the hypothetical examples she poses are far removed from the facts of this case. *Ibid.*[9] But to the extent that the Warden challenges the application of the rule to Mr. Felix's case, her argument suffers from two fundamental defects. First, though she never explains *why* she did not have fair notice of the coerced confession claim, she presumably relies on the fact that the statements of Williams and Mr. Felix were taken about three months apart. Pet. Br. 22. As explained above, however, the operative fact, common to both claims, is that the statements were admitted at Mr. Felix's trial. J.A. 13 (Mr. Felix's "coerced confession claim and Confrontation Clause claim assert that the Constitution was violated by the introduction of his confession and the witness's statements at his trial. Except for the use of these statements at his trial, Felix can state no habeas claim").

---

9. As discussed below, the filing of a habeas corpus petition challenging a criminal judgment puts the State on notice of the injury for which redress is being sought -- that "[h]e is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2241(c)(3). As *Tiller* makes clear, the State is therefore on notice that all "events leading up to" that injury may serve as a basis for claims in an amended petition. 323 U.S. at 581.

Second, even if the initial petition had not provided adequate notice of the coerced confession claim, the Warden cannot credibly assert that she didn't have notice of the claim, because it was raised in the pretrial motion to suppress filed on the third day of trial and already litigated in state court. Some have suggested, as the Warden implicitly does in this case, Pet. Br. 22, see also Br. for United States 10, that the requisite notice may be provided *only* by the content of the original pleading. See 6A *Wright & Miller's Federal Practice* § 1497 at 91-92. The most oft-cited commentators on the Civil Rules, however, explain that "it is unwise to place undue emphasis on the particular way in which notice is received":

> An approach that better reflects the liberal policy of Rule 15(c) is to determine whether the adverse party, viewed as a reasonably prudent person, ought to have been able to anticipate or should have expected that the character of the originally pleaded claim might be altered or that other aspects of the conduct, transaction, or occurrence set forth in the original pleading might be called into question.

Id. at 93 (citing *Barthel*, 145 F.2d at 491); see also 27A Lawyer's Cooperative Publishing, *Federal Procedure: Lawyers Edition* § 62:336, at 127 (1996) ("notice may . . . be received from outside the pleadings"). In this case, where the pro se petitioner challenged the conduct of the trial judge in admitting unconstitutional evidence in the prosecution's case-in-chief, a reasonably prudent warden ought to have been able to anticipate that subsequently appointed habeas counsel would challenge another aspect of the trial judge's conduct that was in fact previously contested, *viz.*, the admission of the coerced confession.

For all these reasons, Mr. Felix's coerced confession claim relates back to the filing of the initial petition under a

traditional application of Civil Rule 15(c).

II.

The Plain Language of 28 U.S.C. § 2242 Requires That Civil Rule 15(c) Be Applied in Habeas Proceedings As It Is In Other Civil Actions, and Renders Irrelevant the Warden's Policy-Based Arguments.

Because the traditional application of Civil Rule 15(c) would allow Mr. Felix's coerced confession claim to relate back to the filing of the initial petition, the Warden is forced to argue that the rule must be applied differently in habeas proceedings, in other words, that the AEDPA worked an implied repeal of Section 2242. She relies for this argument on Civil Rule 81(a)(2) and Habeas Rule 11, which provide that the Civil Rules apply in habeas corpus proceedings to the extent they are not inconsistent with the statutes concerning habeas corpus or the Habeas Rules. Pet. Br. 8-10. But the typical operation of Rule 15(c), as applied to the facts of this case by the circuit court, is not inconsistent with either the statutes concerning habeas corpus or the Habeas Rules. To the contrary, the statutes expressly provide that habeas corpus petitions may be amended as provided for in Civil Rule 15, 28 U.S.C. § 2242, and no Habeas Rule speaks to the issue of amendment. Most importantly, nothing in the AEDPA, outside the provisions of Chapter 154 governing procedures for condemned inmates in certain States, is inconsistent with Section 2242 or Civil Rule 15(c).

The Warden also raises several policy-based arguments, contending that Civil Rule 15(c) should not be applied in a way that undermines "the purposes" of the AEDPA statute of limitations. Pet. Br. 8. But when the language of a statute is as plain and unambiguous as that used in Section 2242 is, policy

arguments are beside the point. *Bennett*, 531 U.S. at 10 ("[w]hatever merits these and other policy arguments may have, it is not the province of this Court to rewrite the statute to accommodate them"). Moreover, as we demonstrate *infra*, Congress's policy objectives are fully satisfied by the elimination of delay-causing amendments in certain capital habeas corpus cases, 28 U.S.C. § 2266(b)(3)(B), and, as Judge Easterbrook has explained, by the ample power that Civil Rule 15(a) vests in the district courts to curtail delays in non-capital cases. *Ellzey*, 324 F.3d at 527.

A. Section 2242 requires that Civil Rule 15(c) be applied in habeas proceedings as it is in other civil actions.

Section 2242 of title 28, United States Code, enacted in 1948, provides that an "[a]pplication for a writ of habeas corpus . . . may be amended or supplemented *as provided in the rules of procedure applicable to civil actions*." 28 U.S.C. § 2242 (emphasis added).[10] The only Civil Rule that addresses the amendment of pleadings, and thus the only rule to which Section 2242 refers, is Civil Rule 15. Every circuit to have considered the issue has held that Civil Rule 15(c) applies to habeas corpus proceedings. *Newell v. Hanks*, 283 F.3d 827, 835 (CA7 2002) (citing cases). While the AEDPA significantly amended a number of the original habeas provisions, it left Section 2242 unchanged.[11] For the Warden to prevail, she must

---

10. When Congress passed the Act of June 25, 1948, it codified existing habeas practices and did not intend to make substantive changes thereto. See H.R. Rep. No. 308, 80th Cong., 1st Sess. A177-78 (1947).

11. The Rules Enabling Act, 28 U.S.C. § 2072, under which a federal statute governing procedure is displaced by a subsequently adopted rule on the subject, does not change the

demonstrate that Congress, which surely knew in 1996 of Civil Rule 15(c)'s "long and distinguished history," impliedly repealed Section 2242 with the passage of the AEDPA. See *Felker v. Turpin*, 518 U.S. 651, 660 (1996) ("[r]epeals by implication are not favored"). This she cannot to do. For "[i]t is not a function of this Court to presume that 'Congress was unaware of what it accomplished.'" *Albernaz v. United States*, 450 U.S. 333, 342 (1981) (quoting *U.S. Railroad Retirement Bd. v. Fritz*, 449 U.S. 166, 179 (1980)).

Moreover, the text of the AEDPA precludes the Warden's argument. The text demonstrates that when Congress wished to change the rule for amending habeas petitions, it did so explicitly in a limited, precisely defined category of cases. Chapter 154 of the AEDPA, which contains special optional provisions for death penalty cases, includes a provision whereby Congress strictly limited the ability of capital petitioners to amend their federal habeas corpus petitions.[12]

---

analysis. Because the amendment of habeas pleadings is addressed by the third paragraph of Section 2242 and is not covered by the Habeas Rules, under Civil Rule 81(a)(2) and Habeas Rule 11 the statute controls, unlike the first two paragraphs of Section 2242, which were supplanted by the later-enacted Habeas Rules. Compare 28 U.S.C. § 2242 ¶3 (concerning amendments, which subject is not covered by Habeas Rules), with 28 U.S.C. § 2242 ¶¶1, 2 (concerning form of application, which is covered and supplanted by Habeas Rule 2(a)-(d)).

12. Much of the Congressional concern motivating passage of the AEDPA focused on delays in federal habeas litigation in capital cases. See, *e.g.*, H.R. Conf. Rep. 104-518, 94th Cong. 2d Sess. 111 (1996) (AEDPA "incorporates reforms to curb the abuse of the statutory writ of habeas corpus, and to address the acute problems of unnecessary delay and abuse in

Section 2266(b)(3)(B) provides that "[n]o amendment to an application for a writ of habeas corpus *under this chapter* shall be permitted after the filing of the answer to the application, except on the grounds specified in section 2244(b)," (emphasis added), which sets forth the standard for filing a second or successive petition. In light of Congress's specific limitation in Section 2266(b)(3)(B) on the right of capital habeas petitioners in "opt-in" States to file amendments to their petitions, the Warden cannot credibly argue that Congress also intended to limit the right of non-capital habeas petitioners (or capital petitioners in non opt-in states) to amend their petitions but left it to the courts to infer that intent. See *Morton v. Mancari*, 417 U.S. 535, 550 (1974) (in the absence of "irreconcilable" statutes, courts may not find implicit repeal unless there is "some affirmative showing of [congressional] intention"). *Calderon v. Ashmus*, 523 U.S. 740, 750 (1998) (Breyer, J., concurring) ("Federal Rule of Civil Procedure 15's liberal standard for amendment applies to habeas petitions in states not eligible for Chapter 154").[13]

---

capital cases"); 141 Cong. Rec. S4591 (daily ed. Mar. 24, 1995) (statement of Sen. Spector); *id.* at S4596 (statement of Sen. Hatch); *id.* at S7486 (daily ed. May 25, 1995) (statement of Sen. Biden); *id.* at S7488 (statement of Sen. Thurmond); *id.* at S7610 (daily ed. May 26, 1995) (statement of Sen. Burns); *id.* at S 7657 (daily ed. June 5, 1995) (statement of Sen. Dole); *id. at* S7662 (statement of Sen. Feinstein); *id.* at S 7666 (statement of Sen. Inhofe).

13. See also *Lindh v. Murphy*, 521 U.S. 320, 327-28 (1997) (negative implication of Section 107(c) of AEPDA was that the Act's changes to Chapter 153 generally applied only to cases filed after the Act's enactment); *Duncan v. Walker*, 533 U.S. 167, 172-73 (2001) (fact that Congress expressly mentioned "Federal" review in Chapter 154 provision but did not in Chapter 153 provision is "strong evidence" that it did not

B. The traditional application of Civil Rule 15(c) is consonant with the AEDPA limitation period.

Statutes of limitation are designed to promote justice by preventing surprises through the revival of stale claims. *Railroad Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 348 (1944). The AEDPA limitation period is animated by the same design. "'The one-year period of limitations contained in the AEDPA is a statute of limitations like any other statute of limitations in a civil proceeding.'" *Fama v. Comm'r of Corr. Servs.*, 235 F.3d 804, 815 (CA2 2000) (quoting *United States v. Thomas*, 221 F.3d 430, 434 (CA3 2000)).[14] The relation back doctrine is consonant with

---

intend to include federal habeas petitions within the scope of 28 U.S.C. § 2244(d)(2), the statutory tolling provision); cf., *Whitfield v. United States*, 125 S. Ct. 687, 692 (2005) ("Congress has included an express overt-act requirement in at least 22 other current conspiracy statutes, clearly demonstrating that it knows how to impose such a requirement when it wishes to do so").

Amicus curiae Criminal Justice Legal Foundation writes that "[a]lthough the AEDPA did not change the law making the rules of civil procedure govern amendments to habeas petitions, see 28 U.S.C. § 2242, this law and Rule 15(c)(2) now operate in the very different world of the AEDPA." CJLF Br. 19. The short answer is that if Congress had indeed intended to create so different a world for non-capital petitioners and capital petitioners in non opt-in States post-AEDPA, it would have done in Chapter 153 what it did in Chapter 154, *i.e.*, expressly say so.

14. For the same reason, courts have held the AEDPA limitation period not to be jurisdictional in nature, see, *e.g.*, *Griffin v. Rogers*, ___ F.3d ___, 2005 U.S. App. LEXIS 3570,

this design because, while it allows new claims to be added to on-going litigation, the requirement that those claims arise from the same conduct, transactions, or occurrence as set forth in the initial pleading ensures that the responding party has been provided adequate notice. *Kinney*, 260 U.S. at 346 ("when a defendant has had notice from the beginning that the plaintiff sets up and is trying to enforce a claim against it because of specified conduct, the reasons for the statute of limitations do not exist"); see also *Baldwin County*, 466 U.S. at 149 n.3; *Fama*, 235 F.3d at 815 ("the seeming inconsistency [between the AEDPA limitation period and Civil Rule 15(c)] is one of appearance alone").

The Warden contends that because the AEDPA statute of limitations protects the finality of state court judgments, it should be applied with a special vigor -- so special, in fact, that it should trump the words of the statute itself, which provide that amendments should be permitted in the traditional manner in which relation back has been applied for more than three-quarters of a century. Pet. Br. 7; see also *id.* at 9; ("Ninth Circuit's so-called 'literal' application of Rule 15(c)(2) to habeas proceedings . . . runs afoul of the principles which inform habeas corpus practice by undermining the limitation period and effectively rewriting the tolling provision").[15] But the

---

*11 (CA6 March 3, 2005), and to be subject to equitable tolling. *Ibid.*

15. One of the Warden's *amici*, the Criminal Justice Legal Foundation, is even more forthright in arguing that because the AEDPA statute of limitations protects the finality of convictions rather than promotes the provision of fair notice, which it admits is the goal of civil limitation periods in general, the traditional test for relation back purposes should be eschewed in favor of a "comparatively restrictive reading of Rule 15(c)(2) in the context of habeas corpus." CJLF Br. 21.

finality of a state court judgment is already put into question whenever a timely habeas corpus petition is filed in federal court, so the effect of allowing an amendment does not appreciably affect the state's interest in finality. The Warden's fear that these marginal costs may be significant because the circuit court's rule permits habeas petitioners to do an "end run" around the statute of limitations and render it ineffective is, as discussed below, unfounded.[16]

C. The district courts are vested with ample power to prevent abuses.

The Warden contends that if Mr. Felix prevails, petitioners will have the right to assert claims on habeas "years after direct review has ended." Pet. Br. 11. For the reasons discussed below, prisoners like Mr. Felix who are serving a non-capital sentence have powerful incentives to litigate their habeas applications expeditiously. See *Rose v. Lundy*, 455 U.S. 509, 520 (1982) ("the prisoner's principal interest . . . is in obtaining speedy federal relief"); *Walker*, 533 U.S. at 191 (Breyer, J., dissenting) ("prisoners not under a sentence of death (the vast majority of habeas petitioners) have no incentive to delay adjudication of their claims").[17] To the extent that

---

16. Although the data is somewhat dated, it suggests that the marginal delay associated with the addition of a claim for relief is relatively minor. See, *e.g.*, United States Department of Justice, Bureau of Justice Statistics, *Federal Habeas Corpus Review: Challenging State Court Criminal Convictions* 24 (1995) (the mean processing time for habeas applications by state prisoners sentenced to a term of years that raised one issue was 211 days, compared to 270 days for applications raising two issues).

17. There's certainly been no undue delay in this case. Mr. Felix's initial federal petition was filed only nine months

delay in capital cases was caused by liberal amendment of applications, the AEDPA specifically addressed that concern in Section 2266(b)(3)(B). See also 28 U.S.C. § 2266(b)(1)(C)(i) (requiring district courts to render decision within 210 days after application is filed).

Pursuant to Civil Rule 15(a), after a responsive pleading has been filed, a prisoner may amend the petition only by leave of court or the written consent of the adverse party. Fed. R. Civ. P. 15(a). While leave is to be freely given "when justice so requires," *ibid.*; *cf.* 28 U.S.C. § 2243 (the court shall dispose of the habeas application "as law and justice require"), there are a number of reasons, which this Court set forth in an illustrative list, why a district court might exercise its discretion to deny leave to amend: "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [and] futility of amendment." *Foman*, 371 U.S. at 181. We know of no reason, and the Warden has certainly not made the case, why district courts should not be trusted to exercise carefully their discretion in permitting amendments to avoid prejudice to the State which, after all, is the primary purpose behind the statute of limitations.

---

after his conviction became final, well within the one-year limitation period. His amended petition was filed eight months thereafter. The Warden complains that the amendment and exhaustion process "delayed the filing of an answer" to the petition. Pet. Br. 15 & n.7 (noting that the exhaustion process took over three-and-one-half months). But Mr. Felix's requests for extensions of time to file the amended petition and to continue the hearing date on the Warden's motion to dismiss were all unopposed by the Warden. Pet. App. H4-6. Relief, not delay, is Mr. Felix's objective.

As Judge Easterbrook concluded, the fact that the AEDPA is designed to expedite resolution of collateral attacks "should influence the exercise of discretion under Rule 15(a) -- which gives the district judge the right to disapprove proposed amendments that would unduly prolong or complicate the case -- rather than lead to a special reading of Rule 15(c)(2)." *Ellzey*, 324 F.3d at 526.

The laws and rules governing habeas proceedings also provide significant disincentives against delay. First, if a prisoner files a "placeholder petition,"[18] it will most likely be dismissed pursuant to Habeas Rule 4, which provides that if it plainly appears from the petition that the petitioner is not entitled to relief, the district court "must" dismiss the petition. See *O'Blasney v. Solem*, 774 F.2d 925, 926 (CA8 1985). Second, the significant hurdle that must be surmounted to avoid dismissal of a claim in a second or successive petition, see 28 U.S.C. § 2244(b)(2), stands as a powerful incentive to assert all claims as early as possible.

Third, the court might find that a new claim is procedurally defaulted, see *Wainwright v. Sykes*, 433 U.S. 72 (1977), or unexhausted, see *Rose*, 455 U.S. at 519, and deny the petition before a responsive pleading is

---

18. The term was coined by Judge Easterbrook to describe a "skeletal document" that broadly states a ground for relief, such as ineffective assistance of counsel at sentencing, but which supplies neither factual detail nor legal elaboration. The purpose of filing such a petition is simply to satisfy the limitation period, with the plan of filing "a real petition" later. *Ellzey*, 324 F.3d at 523. A placeholder petition violates Habeas Rule 2(c)(2), which requires a petition to state the facts supporting each ground for relief. Like most of the Warden's policy concerns, this one is irrelevant to this case because Mr. Felix's was not a placeholder petition.

even filed. See 28 U.S.C. § 2254(b)(2) (application may be denied on the merits "notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State"). Fourth, the procedural rules of States other than California will generally preclude amendments involving claims that have not been already been fully exhausted in the state courts. See *Coleman v. Thompson*, 501 U.S. 722, 731 (1991); *Carey v. Saffold*, 536 U.S. 214, 219 (2002).

The Warden asserts that the circuit court's rule permits a habeas petitioner who has filed a timely federal petition to unduly delay federal habeas proceedings by bouncing back and forth between state and federal courts, repeatedly exhausting "newly developed claims," and amending the federal petition to add the "new claims." Pet. Br. 14 ("there is no statutory limit to the number of times this can be done").[19] A similar argument was raised by the warden in *Slack v. McDaniel*, 529 U.S. 473 (2000), who argued that "a new meaning" be given to "the established term" "second or successive" lest petitioners, following exhaustion, be able to "return to federal court but again file a mixed petition, causing the process to repeat itself." 529 U.S. at 489. Intimating that such vexatious tactics were unlikely, the Court squarely rejected the argument. "To the extent the tactic would become a problem . . . it can be countered without upsetting the established meaning of a second or successive petition." *Id.* at 489-90.

Accordingly, even if the policy concerns raised by the Warden here were valid and relevant to the facts of this case, they would not justify disregarding the plain language of Civil Rule 15(c) and Section 2242.

---

19. Again, this policy concern of the Warden is not presented by the facts of this case; Mr. Felix's coerced confession claim was not a "new" or a "newly developed" claim, nor did he return more than once to the state courts.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the lower court.

Respectfully submitted,

QUIN DENVIR
Federal Defender

DAVID M. PORTER
Assistant Federal Defender
Counsel of Record

Attorneys for Respondent
JACOBY LEE FELIX

March 2005

COPY

(10)

No. 04-563

Supreme Court, U.S.
FILED
APR 4 - 2005
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

DENEICE A. MAYLE, Warden, *Petitioner,*

v.

JACOBY LEE FELIX, *Respondent.*

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY BRIEF ON THE MERITS

BILL LOCKYER
Attorney General of the State of California
MANUEL M. MEDEIROS
State Solicitor General
ROBERT R. ANDERSON
Chief Assistant Attorney General
MARY JO GRAVES
Senior Assistant Attorney General
JANET E. NEELEY
WARD A. CAMPBELL
Supervising Deputy Attorneys General
MATHEW CHAN
Deputy Attorney General
Counsel of Record
1300 I Street
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 324-5232
Fax: (916) 324-2960
Counsel for Petitioner

TABLE OF CONTENTS

Page

I. AEDPA AND THE HABEAS RULES GOVERN THE APPLICATION OF CIVIL RULE 15(C)(2)2

A. This Court's Interpretation of Rule 15(c)(2) **Must Be Informed by AEDPA and the Rules Applicable to Habeas Corpus** 2

B. The Requirement of Habeas Rule 2 that a Petition State Specific Factual Grounds for Relief Contradicts Respondent's Generalized Interpretation of Rule 15(c)(2) 4

C. The Ninth Circuit's Interpretation Of Civil Rule 15(c) Is Inconsistent With AEDPA's Provisions And The Habeas Corpus Framework 7

D. The Warden's Interpretation Of Rule 15(c)(2) Would Not Result In Unfairness To Litigants 9

II. *TILLER V. ATLANTIC COAST LINE R. CO.*, 323 U.S. 574 (1945), IS COMPATIBLE WITH THE WARDEN'S POSITION THAT THE NINTH CIRCUIT'S INTERPRETATION OF RULE 15(C)(2) VIOLATES THE POLICY OF NOTICE11

III. THE NINTH CIRCUIT'S RULE DOES NOT PROVIDE FOR THE "FAIR NOTICE" REQUIRED UNDER CIVIL RULE 15(C)(2) 13

TABLE OF CONTENTS (continued)

	Page
IV. THE NINTH CIRCUIT'S RULE PRESENTS A POTENTIAL FOR SUBSTANTIAL DELAY AND PIECEMEAL LITIGATION	16
CONCLUSION	18

TABLE OF AUTHORITIES

	Page
Cases	
Artuz v. Bennett, 531 U.S. 4 (2000)	8
Baldwin County Welcome Center v. Brown, 466 U.S. 147 (1984)	5, 6, 12, 13
Cannon v. University of Chicago, 441 U.S. 677 (1979)	12
Conley v. Gibson, 355 U.S. 41 (1957)	4
Duncan v. Walker, 533 U.S. 167 (2001)	8, 9
E.W. French & Sons, Inc. v. General Portland Inc., 885 F.2d 1392 (9th Cir. 1989)	7
Engberg v. Wyoming, 265 F.3d 1109 (10th Cir. 2001)	10
Fuller v. Marx, 724 F.2d 717 (8th Cir. 1984)	12
Harris v. Nelson, 394 U.S. 286 (1969)	2, 10
Johnson v. United States, 544 U.S. ___ (Apr. 4, 2005) (No. 03-9685)	10

TABLE OF AUTHORITIES (continued)

	Page
McFarland v. Scott, 512 U.S. 849 (1994)	5
Moore v. Baker, 989 F.2d 1129 (11th Cir. 1993)	12
Nettis v. Levitt, 241 F.3d 186 (2d Cir. 2001)	12
Percy v. San Francisco General Hosp., 841 F.2d 975 (9th Cir. 1988)	12
Pitchess v. Davis, 421 U.S. 482 (1975)	2
Pliler v. Ford, 542 U.S. 225, 124 S.Ct. 2441 (2004)	7
Rhines v. Weber, 544 U.S. ___ (Mar. 30, 2005) (No. 03-9046)	3, 9, 16
Rose v. Lundy, 455 U. S. 509 (1982)	13
Sierra Club v. Penfold, 857 F.2d 1307 (9th Cir. 1988)	7
Terrovona v. Kincheloe, 852 F.2d 424 (9th Cir. 1988)	10
Tiller v. Atlantic Coast Line R. Co., 323 U.S. 574 (1945)	7, 11-13

TABLE OF AUTHORITIES (continued)

	Page
Wilson v. Fairchild Republic Co., Inc., 143 F.3d 733 (2d Cir. 1998)	13
Woodford v. Garceau, 538 U.S. 202 (2003)	8
Statutes	
15 U.S.C.A. § 15b	7
28 U.S.C. § 2242	1
28 U.S.C. § 2244(d)(1)	7
28 U.S.C. § 2244(d)(2)	8
28 U.S.C. § 2254	10, 13
28 U.S.C. § 2255	13
28 U.S.C. § 2401(a)	7
28 U.S.C. § 2415	7
28 U.S.C.A. § 2401(a)	7
45 U.S.C. § 51 *et seq.*	7
45 U.S.C.A. § 56	7
Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA")	*passim*
Chapter 154	17
Chapter 153	17
Federal Rule of Civil Procedure 8(a)	4, 12

TABLE OF AUTHORITIES (continued)

	Page
Federal Rule of Civil Procedure	
15	1
15(a)	16, 17
15(c)	7, 8, 15, 17
15(c)(2)	*passim*
60(b)	2
81(a)(2)	2
Court Rules	
Rules Governing § 2254 Cases	
Habeas Rule 2	12, 15
Habeas Rule 2(c)	4-6, 12
Habeas Rule 5(a)	16
Habeas Rule 5(b) & (c)	17
Habeas Rule 11	2, 3
Rules Governing § 2254 Cases or Rules Governing § 2255 Proceedings	
Habeas Rules	4
Other Authorities	
3 J. Moore et al., *Moore's Federal Practice* § 15.19[2] (3d ed. 2004)	14
6A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 1497 (2d ed. 1990)	6

TABLE OF AUTHORITIES (continued)

	Page
Charles E. Clark, *Handbook of the Law of Code Pleading* § 118 (2d ed. 1947)	11
Fleming James, Jr., Geoffrey C. Hazard Jr., & John Leubsdorf, *Civil Procedure* § 4.23 (5th ed. 2001)	11
U.S. Dept. of Justice, Office of Justice Programs, Bureau of Justice Statistics, Federal Habeas Corpus Review: Challenging State Court Criminal Convictions 23-24 (1995)	17

IN THE SUPREME COURT OF THE UNITED STATES

No. 04-563

DENEICE A. MAYLE, Warden, *Petitioner,*

v.

JACOBY LEE FELIX, *Respondent.*

Contrary to respondent's contention, the Warden agrees that Civil Rule 15 applies to habeas petitions.[1/] Pet. Br. 10 n.5. However, unlike respondent, the Warden interprets Civil Rule 15(c)(2) as applying only when the amendment relates to facts underlying specific claims in the original petition. Respondent's position allows any amendments alleging claims "stemming from pre-trial motions, the trial and sentencing" to relate back. J.A. 17-18. His interpretation renders meaningless the limiting parameters of the relation back doctrine to habeas petitions and transforms Rule 15(c)(2) into a "rubber stamp." Of the two options presented to this Court, the Warden's interpretation of Civil Rule 15(c)(2) is the only one that comports with the purposes of AEDPA's statute of limitations, is consistent with the habeas provisions, and pays proper respect to the notice requirements of Rule 15.

---

1. Thus, respondent's argument regarding the viability of 28 U.S.C. § 2242 is irrelevant.

I.

AEDPA AND THE HABEAS RULES GOVERN THE APPLICATION OF CIVIL RULE 15(C)(2)

This Court has recognized that a habeas proceeding, which is characterized under the "gross and inexact" label of a "civil" proceeding, is unique. *Harris v. Nelson*, 394 U.S. 286, 293-94 (1969).

A. This Court's Interpretation of Rule 15(c)(2) Must Be Informed by AEDPA and the Rules Applicable to Habeas Corpus

Civil Rule 81(a)(2) states that the Federal Rules of Civil Procedure apply to "proceedings for . . . habeas corpus . . . to the extent that the practice in such proceedings is not set forth in . . . the Rules Governing Section 2254 Cases or the Rules Governing Section 2255 Proceedings." Habeas Rule 11 provides that the civil rules, "to the extent they are not inconsistent with any [habeas] provisions or these rules, *may* be applied." (Emphasis added.) This rule is intended to conform with this Court's approach in *Harris v. Nelson*, 394 U.S. 286 (1969), in which this Court "reiterated its commitment to judicial discretion in formulating rules and procedures for habeas proceedings." Advisory Committee Note to Habeas Rule 11. It also states that the court need not "rigidly apply rules which would be inconsistent or inequitable in the overall framework of habeas corpus" and that it should apply "civil rules only when it would be appropriate to do so." *Id.*, citing *Pitchess v. Davis*, 421 U.S. 482 (1975) (Civil Rule 60(b) "should not be applied in a habeas case when it would have the effect of altering the statutory exhaustion requirement of 28 U.S.C. § 2254"). One of respondent's *amici* notes that Congress recognized that in some cases, the Court must exercise its discretionary authority to diverge from "the Rules" (presumably

meaning the civil rules). Miller Amicus Br. 18. The amicus brief posits that discretion only allows for a determination of whether the civil rule should be applied, not how the rule should be interpreted. *Id.* But nothing restricts this Court's authority to interpret how Civil Rule 15(c)(2) is to be applied to habeas proceedings. In fact, the text and Advisory Committee Note to Rule 11 reflects that the Court is empowered to tailor application of any civil rule in the habeas context. Because Habeas Rule 11 prevents use of civil rules when inconsistent with habeas provisions or rules, and warns against rigidly applying the civil rules when it would be inappropriate to do–Habeas Rule 11 speaks against the Ninth Circuit's interpretation of Civil Rule 15(c)(2).

Similarly, this Court's construction of Rule 15(c)(2) should be compatible with AEDPA's twin purposes of promoting finality and streamlining habeas proceedings. The Warden's position is bolstered by this Court's recent decision in *Rhines v. Weber*, 544 U.S. ___ (Mar. 30, 2005) (No. 03-9046). In *Rhines*, this Court held that AEDPA circumscribe a court's discretion to issue "stay-and-abeyance" orders for mixed petitions. Slip op. at 5-8. Likewise, AEDPA informs how Civil Rule 15(c)(2) should be applied to habeas proceedings.[2/]

---

2. In *Rhines*, the Court recognized that staying a federal habeas petition frustrates AEDPA's objective of finality and undermines AEDPA's goal of streamlining federal habeas proceedings by decreasing a petitioner's incentive to exhaust all of his claims in state court prior to filing his federal petition. Slip op. at 6. Nonetheless, this Court found those interests outweighed when a habeas petitioner, who diligently files an unexhausted and potentially meritorious claim within the statute of limitations period, would be precluded from raising that claim absent a stay of the federal proceedings. See *id* at 8. This case obviously differs. Respondent is not merely asking for a stay to protect a timely claim; he is asking for this Court to revive an otherwise expired claim.

B. The Requirement of Habeas Rule 2 that a Petition State Specific Factual Grounds for Relief Contradicts Respondent's Generalized Interpretation of Rule 15(c)(2)

Civil Rule 15(c)(2) permits relation back when the original pleading gives sufficient notice of the substance of the plaintiff's claim. An amendment relates back "when . . . the claim or defense asserted in the amended pleading arose out of the *conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading*." Fed. R. Civ. P. 15(c)(2) (emphasis added). The sole question in this case is how to apply that rule when the amendment occurs in a collateral attack on an otherwise final criminal conviction. Respondent and his *amici* argue that under the plain meaning of Rule 15(c)(2), the relevant conduct, transaction, or occurrence that is set forth in a habeas petition is the trial and conviction since the prisoner's injury comes from the conviction and that the habeas proceeding seeks relief from that injury. Resp. Br. 10; Miller Amicus Br. 5-6; see Alschuler Br. 8-9. They ignore the actual pleading requirements of habeas proceedings in Habeas Rule 2. Equally telling is that neither respondent nor his *amici* contest the conclusion of the majority of the courts of appeals that the Ninth Circuit's interpretation of Rule 15(c)(2) will always permit relation back of an otherwise untimely amendment no matter how disparate the claims raised in the amendment are from those in the original petition. Pet. Br. 11-12; U.S. Amicus Br. 17-18.

Habeas Rule 2(c) provides that the habeas petition must: "(1) specify all the grounds for relief available to the petitioner; [and] (2) state the facts supporting each ground." See Advisory Note to Rule 2. These specific pleading requirements were also incorporated in the *pro se* form annexed to the Habeas Rules. States' Amicus Br. 4-5; see U.S. Amicus Br. 14. Thus, whereas civil cases require only notice-pleading, Fed. R. Civ. P. 8(a); *Conley v. Gibson*, 355 U.S. 41, 47 (1957), "[h]abeas corpus

petitions must meet heightened pleading requirements," *McFarland v. Scott*, 512 U.S. 849, 856 (1994); *accord id.* at 860 (Opinion of O'Connor, J.) ("[T]he habeas petition, unlike a complaint, must allege the factual underpinning of the petitioner's claims.") (citing Habeas Corpus Rule 2(c)). Accordingly, the "conduct, transaction or occurrence" "set forth" in a habeas petition is "the facts underlying the specific claims asserted in the original petition." Pet. Br. 6. A habeas petition cannot simply challenge a conviction, it must allege a specific claim with supporting facts. Thus, while respondent and *amici* spend considerable effort arguing that "conduct, transaction or occurrence" mean a trial, they disregard the remaining text of Rule 15(c)(2) that requires that the "conduct, transaction or occurrence" must be "set forth or attempted to be set forth in the original pleading." After all, what is set forth in the pleading is what provides the notice required for Civil Rule 15(c)(2). For habeas petitions, what is "set forth" in Rule 15(c)(2) logically refers to what is required to be set forth in Habeas Rule 2(c). U.S. Amicus Br. 8. This Court stated in *Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 149 n.3 (1984):

> The rationale of Rule 15(c) is that a party who has been notified of litigation concerning a particular occurrence has been given all the notice that the statute of limitations were intended to provide. 3 J. Moore, Moore's Federal Practice ¶ 15.15[3], p. 15-194 (1985). Although the Federal Rules of Civil Procedure do not require a claimant to set forth an intricately detailed description of the asserted basis for relief, they do require that the pleadings "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Conley v. Gibson*, 355 U.S. 41, 47, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957). *Because the initial "pleading"* [a right-to-sue letter] *did not contain such notice, it was not an original pleading that could be rehabilitated by invoking Rule 15(c).* (Emphasis added.)

Thus, where the pleading is insufficient and fails to provide "fair notice," Civil Rule 15(c)(2) does not apply. "A failure of notice will prevent relation back." 6A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure*, § 1497, at 85-86, 89 (2d ed. 1990).

In habeas practice, a petition setting forth claims of federal constitutional error and the facts that support them provide adequate notice of possible additional claims which may clarify or amplify the stated facts, or of possible additional claims based on different legal theories that are predicted on the same core of facts set forth in the original petition. Conversely, in light of the pleading requirements of Habeas Rule 2(c), the responding party has no reason to anticipate the filing of a brand new claim of constitutional error based on facts totally unrelated to those set forth in the original petition. Respondent argues that notice is not limited to the face of the pleading. Resp. Br. 24. However, respondent cannot reconcile that contention with either the text of Rule 15(c)(2) which requires the relevant occurrence to be stated in the "original pleading" or the Court's holding in *Baldwin County Welcome Center*, 466 U.S. at 149 n.3.

In this case, respondent sets forth three specific claims for relief in his initial timely petition. The claim which respondent sought to amend to that petition was supported by facts wholly unrelated to the facts alleged in respondent's original petition. Accordingly, the district court properly concluded that the new claim did not relate back under Civil Rule 15(c)(2) since the new claim did not arise out of the "conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading."

C. The Ninth Circuit's Interpretation Of Civil Rule 15(c) Is Inconsistent With AEDPA's Provisions And The Habeas Corpus Framework

The Ninth Circuit's construction of Rule 15(c)(2), renders AEDPA's limitations period virtually ineffective because once an inmate has filed a timely habeas petition, the habeas inmate is forever free from the constraints of the statute of limitations. Respondent suggests that this result is justified because of the use of the word "application" in 28 U.S.C. § 2244(d)(1), which provides: "[a] 1-year period of limitation shall apply to an application for writ of habeas corpus by a person in custody pursuant to the judgment of a State court." Resp. Br. 20 n.7.

That section 2244(d)(1) refers only to an application rather than to claims made in the application is inconsequential. Statutes of limitations are generally directed to the commencement of an action or the filing of a complaint within a certain time period, without reference to any claims therein. *E.g.*, 15 U.S.C.A. § 15b; 28 U.S.C.A. § 2401(a); accord 28 U.S.C. § 2415; 45 U.S.C.A. § 56. Thus, the generic reference to a complaint or action does not mean that once a complaint has been filed that the statute of limitations no longer applies to bar new untimely claims. *E.g.*, *Tiller v. Atlantic Coast Line R. Co.*, 323 U.S. 574, 575, 580-81 (1945) (applied Rule 15(c) to three-year statute of limitations under the Federal Employers' Liability Act, 45 U.S.C. § 51 et seq.); *Sierra Club v. Penfold*, 857 F.2d 1307, 1315-16 (9th Cir. 1988) (new claim did not relate back and was time-barred under 28 U.S.C. § 2401(a)); *E.W. French & Sons, Inc. v. General Portland Inc.*, 885 F.2d 1392, 1396 (9th Cir. 1989) (applied Rule 15(c) to four-year statute of limitations under 15 U.S.C.A. § 15b). Likewise, use of "application" in 28 U.S.C. § 2244(d)(1) does not mean that new claims can be added simply because a timely application is pending. *See Pliler v. Ford*, 542 U.S. 225, 124 S.Ct. 2441, 2451 (2004) (Breyer, J., dissenting) (AEDPA's limitation period "requires a prisoner to file a federal habeas petition with at least

one exhausted claim within the 1-year period, and *it prohibits habeas petitioner from subsequently including any new claim.*") (Emphasis added).[3/]

While respondent recognizes that AEDPA's statute of limitations furthers finality, he argues that once a federal habeas petition is filed, the finality of a state court judgment is already put in question and therefore an amendment thereto does not "appreciably" affect the state's interest in finality. Resp. Br. 31. That is simply wrong. Certainly, additional delay occurs when the parties and a federal court have to address more claims, even if the additional claims do not lead to discovery and/or an evidentiary hearing. And even more delay occurs when an amendment alleges unexhausted claims, which then require exhaustion in state court.

Of course, there is some delay whenever relation back is allowed. Nonetheless, Rule 15(c) exists even in light of the interests in repose. However, delay is especially offensive in the habeas corpus context because it is delay in the execution of a criminal judgment, that has most likely been affirmed in one or more forums. In a habeas proceeding challenging a California conviction, the judgment would have been subject to intermediate appellate review and review by the state's highest court. A California prisoner could seek habeas review in the State's trial, appellate *and* supreme courts. Thus, unwarranted delay in habeas litigation is even more offensive than in an ordinary civil setting. *But see* Miller Amicus Br. 17.

Congress enacted AEDPA to reduce delay in the execution of state and federal sentences and to promote the principles of finality, comity and federalism. *Woodford v. Garceau*, 538 U.S. 202, 206 (2003). As noted in *Duncan v. Walker*, 533 U.S. 167

---

3. For the same reason, *Artuz v. Bennett*, 531 U.S. 4 (2000) is irrelevant. *Artuz* merely explained when a state habeas application is properly filed under the tolling provisions of 2244(d)(2). It does not indicate that AEDPA's statute of limitations will not apply to amendments to a petition after the statute has run.

(2001), AEDPA's purpose and the limitations, tolling and exhaustion provisions all work to promote the filing of one federal petition *after* the prisoner has concluded proceedings in state court. *Id.* at 180-81; *Rhines*, 544 U.S. ___, slip op. at 6. Since the Ninth Circuit's rule allows an inmate to do an "end run" around the limitations period by extending the period in which he can bring claims, and since that rule decreases an inmate's incentive to exhaust all his claims in state court prior to filing his federal petition, Pet. Br. 8-15, the Ninth Circuit's interpretation is inconsistent with AEDPA's limitations, tolling and exhaustion provisions. Since that interpretation also frustrates Congress's intent to promote principles of finality, comity and federalism, which are fundamental to habeas corpus, the Ninth Circuit's application of Civil Rule 15(c)(2) is also inconsistent with the framework of habeas corpus and should not be allowed.

D. The Warden's Interpretation Of Rule 15(c)(2) Would Not Result In Unfairness To Litigants

One of respondent's *amici* asserts that a different interpretation of Civil Rule 15(c)(2) for habeas petitions would result in unfairness to litigants and cause confusion and complexity. Miller Amicus Br. 16-18. The Warden does not agree that her position amounts to a "different" interpretation of that rule. As interpreted in ordinary civil context, the Warden's interpretation of Rule 15(c)(2) does not remove all limits to the relation back doctrine. Any differences in interpretation of the rule for habeas and ordinary civil cases is explained by the fact that the rules governing habeas proceedings simply do not exist in other civil contexts. Nothing indicates that the interpretation advocated by the Warden would cause confusion regarding how Civil Rule 15(c)(2) will be applied to non-habeas civil cases–because there is no other equivalent to habeas litigation. And *amici* does not explain how a different interpretation for

habeas proceedings creates unfairness since "the [habeas] proceeding is unique," *Harris*, 394 U.S. at 294.

This Court should reject the suggestion to favor the Ninth Circuit's interpretation of Civil Rule 15(c)(2) because the majority of habeas corpus petitions are filed by *pro se* inmates. Alschuler Amicus Br. 27-28. Generally, appointment of counsel in 28 U.S.C. § 2254 cases are at the court's discretion. *Engberg v. Wyoming*, 265 F.3d 1109, 1122 (10th Cir. 2001); *Terrovona v. Kincheloe*, 852 F.2d 424, 429 (9th Cir. 1988). While the appointment of counsel may result in an amended petition that adds new claims, that is not always the case. The appointment of counsel can result in the winnowing of claims or clarification of the facts and argument presented to the court. And, as evidenced by this case, counsel will likely have ample opportunity to file a timely amendment if the *pro se* inmate makes the effort to file his federal habeas petition as soon as possible. Here, respondent filed his initial federal petition (which only required him to fill out a form and attach a copy of his petition for review to the California Supreme Court, Pet. App. G5-6), nine months after his state conviction became final. Resp. Br. 31-32 n.17. His appointed counsel was able to file an amended petition eight months thereafter, after the court granted unopposed extensions of time. *Id.* Thus, had respondent bothered to file his initial petition within four months of when his conviction became final, the amended petition would have been timely. *See Johnson v. United States*, 544 U.S. ___ (Apr. 4, 2005) (No. 03-9685), slip op. at 15 (this Court noted *pro se* status did not excuse lack of diligence). Basically, the longer a *pro se* inmate waits to file his habeas petition, the less time his appointed attorney will have to file an amendment to the petition should one be deemed necessary. Thus, the Warden's position gives additional incentive for prompt filing of the habeas petition.

In any event, this Court's ruling in this case affects not only *pro se* filings, but filings from represented capital inmates. If the Ninth Circuit rule is upheld, it is likely that such inmates

will file amendments after expiration of the limitations period to add new claims to delay their execution.

II.

TILLER V. ATLANTIC COAST LINE R. CO., 323 U.S. 574 (1945), IS COMPATIBLE WITH THE WARDEN'S POSITION THAT THE NINTH CIRCUIT'S INTERPRETATION OF RULE 15(C)(2) VIOLATES THE POLICY OF NOTICE

In *Tiller*, this Court addressed the question of whether a new claim based on a different theory that was added by amendment after the statute of limitations period related back to the original complaint. 323 U.S. at 576, 580. This Court found that it did because both the original complaint and the amended complaint "related to the same general conduct, transaction and occurrence which involved the death of the deceased" and therefore the respondent "had notice from the beginning that petitioner was trying to enforce a claim against it because of the events leading up to the death of the deceased in respondent's yard." *Id.* at 581. In *Tiller*, one of the original claims and the new claim added by amendment referred to the improper lighting of the train, albeit the new claim alleged a failure to have a light in the front as well as the back of the locomotive. *Id.* at 577, 581. Unquestionably, the original and the amended complaints alleged related facts and pertained to the same railroad accident that injured the plaintiff.[4/]

---

4. Respondent cites authority suggesting *Tiller* did not open the door for claims based on new facts totally unrelated to claims in an initial petition. Resp. Br. 18, citing Fleming James, Jr., Geoffrey C. Hazard Jr., & John Leubsdorf, *Civil Procedure* § 4.23 at 278 (5th ed. 2001) (limitations policies are not threatened by amendments "even when the new ground involves a *variation* in the facts") (emphasis added) and Charles E. Clark, *Handbook of the Law of Code Pleading* § 118 at 731 (2d ed. 1947) ("*unless*

Tiller was a garden variety tort case which could not speak to Rule 15(c)'s application to post-AEDPA petitions and their more stringent pleading standards under Habeas Rule 2.[5/] However, *Tiller*'s analysis is consistent with the Warden's position that amendments must "relate back" to a particular "core set of facts" underlying a specific claim of constitutional error that has been set forth in the original petition.

By holding that a civil complaint pleading an injury (e.g., wrongful death) puts the responding party on notice of all causes of action leading up to that injury, *Tiller* confirms that a claim based on a new theory can relate back to a timely pleading so long as the initial pleading was sufficient to provide adequate notice. *Baldwin County Welcome Ctr.*, 466 U.S. at 150 n.3. But, as discussed, what is a sufficient pleading in a typical civil case is not a sufficient pleading for habeas corpus. Compare Fed. R. Civ. P. 8(a) with Habeas Rule 2(c). A habeas petitioner cannot meet his pleading requirement by simply alleging that he is suffering the injury of unlawful detention. Such a broad pleading does not alert the responding party as to the constitutional basis for relief or the facts in support thereof, let alone any future claims that may be made. It would not provide the notice required under Civil Rule 15(c)(2), and would most

---

there has been so great a change in the material operative facts that an entirely different fact situation is presented, the amendment will be allowed") (emphasis added). Further, case law following *Tiller*, support that view. Pet. Br. 20, citing *Nettis v. Levitt*, 241 F.3d 186, 193 (2d Cir. 2001); *Percy v. San Francisco General Hosp.*, 841 F.2d 975, 977-79 (9th Cir. 1988); *Moore v. Baker*, 989 F.2d 1129, 1130-32 (11th Cir. 1993); *Fuller v. Marx*, 724 F.2d 717, 720-21 (8th Cir. 1984); see also cases listed in States's Amicus Br. 16-17.

5. While Congress is, of course, assumed to know the law, *Cannon v. University of Chicago*, 441 U.S. 677, 696-97 (1979), and thus the existence of the relation back doctrine under Civil Rule 15(c)(2) and the *Tiller* case, Miller Amicus Br. 18 n.6, it should be equally assumed that Congress knew that *Tiller* could not have meant to dictate how Civil Rule 15(c)(2) would be applied in a habeas setting. That question was never before the Court.

likely be dismissed under Habeas Rule 4. Resp. Br. 33.

Respondent acknowledges that under Civil Rule 15(c)(2), not all claims will relate back to the date of the filing of the initial pleading. Resp. Br. 19. And *Tiller* did not eliminate all restrictions to the relation back doctrine under Civil Rule 15(c)(2). But that is precisely the outcome under respondent's point of view–i.e., all claims raised in a habeas petition that challenges a judgment or conviction under 28 U.S.C. §§ 2254 and 2255 will relate back to the timely filed petition.

III.

THE NINTH CIRCUIT'S RULE DOES NOT PROVIDE FOR THE "FAIR NOTICE" REQUIRED UNDER CIVIL RULE 15(C)(2)

One of respondent's *amici* point to AEDPA's exhaustion requirement as additional support that a federal habeas petition provides notice of all potential claims stemming from a criminal judgment since claims in the federal petition would already have been litigated in state court. Alschuler Amicus Br. 9-10. That argument fails on two points. First, as already noted, Civil Rule 15(c)(2)'s fair notice requirement is predicated on what is contained in the original pleading. Fed. R. Civ. P. 15(c)(2); *Baldwin County Welcome Ctr.*, 466 U.S. at 150 n.3. Second, *amici* fails to consider the flip side of this argument–that the state reasonably expects inmates to meet the "simple and clear instruction to potential litigants: before you bring any claims to federal court, be sure that you first have taken each one to state court." *Rose v. Lundy*, 455 U. S. 509, 520 (1982); *cf. Wilson v. Fairchild Republic Co., Inc.*, 143 F.3d 733, 739 & n.6 (2d Cir. 1998) (opposing party did not have fair notice of new claims because new claim had not been administratively exhausted and thus could not have been properly included in the original pleading). The total exhaustion rule is undermined by the Ninth Circuit's interpretation of Rule 15(c)(2), which permits relation

back regardless of whether the amended claim had been previously asserted.

Respondent cannot dispute that *entirely different* evidence is required to prove his coerced confession claim. *See* 3 J. Moore et al., *Moore's Federal Practice* § 15.19[2], at 15-83, 15-84 (3d ed. 2004) (in determining if a claim arose from same conduct, transaction or occurrence, one factor the court should consider is whether plaintiff will rely on the same kind of evidence offered in support of the original claim to prove the new claim). Instead, he insists that presentation of a Confrontation Clause claim put the Warden on notice of the untimely coerced confession claim because both "arose on successive days during the trial and both challenged the unconstitutional admission of pretrial statements" during the case-in-chief. Resp. Br. 21-23.

The presentation of a single timely claim of evidentiary error with specific facts supporting that precise claim does not provide notice of other future claims and supporting facts. Pet. Br. 21-22. It does not even provide notice of other types of *evidentiary error*. For example, a single Confrontation Clause claim of evidentiary error does not provide fair notice of other claims of evidentiary error such as:

- improper lineup for identification of the defendant
- no chain-of-custody of seized evidence
- statements taken without reading warnings regarding right to counsel
- testing of evidence by non-established means
- hearsay with no exceptions
- no basis for admission of prior misconduct
- incriminating statements by co-defendant
- "testimonial" hearsay
- involuntary statements

A habeas petitioner would be relying on one set of facts to prove the original claim of evidentiary error and on an entirely

different set of facts to prove the other above-mentioned claims of evidentiary error. Respondent's position would make a sham of the notice policy in light of the pleading requirements under Habeas Rule 2 and the text of Civil Rule 15(c)(2) that requires that both the original and amended pleading relate to the same "transaction, conduct or occurrence."[6]

Respondent's concern that the Warden's interpretation of Civil Rule 15(c)(2) will preclude review of belated meritorious claims is unfounded. In reality, it is an argument against AEDPA's statute of limitations. The position advocated by the Warden, i.e., that "conduct, transaction or occurrence" be construed "as the facts underlying the specific claims asserted in the original petition," Pet. Br. 6, is compatible with civil practice. It allows for relation back of an untimely amendment to cure technical defects, to amplify or clarify facts set forth in the initial pleading or to add legal theories relating to the set of facts previously set forth. Pet. Br. 27-28; U.S. Amicus at 8. But unlike the Ninth Circuit's rule, it does not work to rewrite Civil Rule 15(c) so that the limits to the relation back doctrine are inapplicable to habeas challenges to a judgment of conviction or sentence.

---

6. Respondent also argues that even if the initial petition did not put the Warden on notice of the coerced confession claim, the Warden was nonetheless on notice because the claim had been raised in the lower court. Resp. Br. 24. Prior to jury selection, the state court denied the motion to suppress respondent's statements. CT 583-590, 591, 596. However, the claim was never raised again at trial, new trial motion, or appeal, CT 697-706; RT 722-732, 1556-1563; Pet. App. E, or in the original habeas petition. The Warden could reasonably conclude that petitioner had abandoned the claim.

IV.

THE NINTH CIRCUIT'S RULE PRESENTS A POTENTIAL FOR SUBSTANTIAL DELAY AND PIECEMEAL LITIGATION

Respondent and *amici* assert that the majority of inmates have no incentive to delay habeas proceedings. Resp. Br. 32. Even if true, that is not the point. It does not matter that delay is not the motivating factor for filing a new claim after the limitations period has expired. The statute of limitations is undermined regardless of the person's intent.[7]

While acknowledging that capital inmates may seek delay, *Rhines*, 544 U.S. ___ , Slip Opn. at 7 (observing that "capital petitioners might deliberately engage in dilatory tactics"), respondent and *amici* believe that sufficient safeguards exists to prevent inmates from "gaming" the system. Resp. Br. 31; Alschuler Amicus Br. 23-24; Miller Amicus Br. 19-21. Respondent ignores that an inmate with numerous claims only has to properly plead a single one in order to keep the door open for the addition of new claims. Resp. Br. 33.

Respondent and *amici* also rely on the district court's discretion to preclude untimely amendments under Civil Rule 15(a). Under that rule, inmates can amend their pleadings once "as a matter of course" any time before a responsive pleading is filed. Fed. R. Civ. P. 15(a). The suggestion that the State can quickly file an unsolicited answer to eliminate that right is unreasonable. Alschuler Amicus Br. 24. The realities of legal practice require that the State first file a responsive pleading in those cases in which responsive pleadings are actually due. Habeas Rule 5(a) (no answer required unless ordered). In

7. The delay occasioned by the filing of an unexhausted claim could have been longer in this case had the state court been less prompt in ruling on respondent's exhaustion petition. In his opposition to the Warden's motion to dismiss, Pet. App. H7, respondent asked for "stay-and-abeyance," Resp. Opp. to Motion to Dismiss (filed on May 6, 1999).

addition, the filing of an answer in a capital case is generally no easy task. *See* Habeas Rule 5(b) & (c).

Furthermore, any inmate may forestall the filing of a responsive pleading by filing an amendment containing unexhausted claims. Such a filing will frequently be met by a motion for dismissal for failure to exhaust. As previously discussed, such motions do not count as responsive pleadings. Pet. Br. 16.

After a responsive pleading has been filed, Rule 15(a) still provides that leave to amend "shall be freely given." Rule 15(a) simply does not provide the same protections against untimely expansion of the petition as Civil Rule 15(c). If it were otherwise, there would be no need for any limiting parameters in the relation back rule.[8]

Finally, an inmate need not be concerned that his petition will be denied before he can amend it. See Resp. Br. 33. Even non-capital cases take considerable time to resolve. See U.S. Dept. of Justice, Office of Justice Programs, Bureau of Justice Statistics, Federal Habeas Corpus Review: Challenging State Court Criminal Convictions 23-24 (1995) (the average (mean) number of days for processing a petition is 477 days when resolved on the merits and 268 days when disposed of on procedural grounds). More complex capital cases will take even longer time. *Id.* at 25 (the average (mean) processing time for death penalty cases with three or more issues was 925 days). In any event, an inmate need not wait until the last possible

8. The strict limitations on amendments in Chapter 154 of AEDPA are irrelevant. Congress obviously intended to limit amendments in capital cases in which states met certain conditions for appointment of counsel. However, those limitations shed no light on how Civil Rule 15(c) applies in Chapter 153 cases. Congress did not make any specific changes in amendments for Chapter 153 cases because it could have assumed that Rule 15(c) would be applied as the majority of circuits have held it should be applied, i.e., the position advocated by the Warden. Even without Chapter 154's particularly stringent protections in capital cases, the States are entitled to protections against untimely amendments under Chapter 153.

moment to amend his petition in order to frustrate AEDPA's statute of limitations.

AEDPA was designed to prevent the very type of delay that the Ninth Circuit's rule allows.

CONCLUSION

For the reasons stated in the Petitioner's Brief On The Merits, and by the *amici curiae* briefs in support of the petitioner, and for those reasons stated herein, the Warden respectfully asks that the Ninth Circuit opinion be reversed.

Dated: April 4, 2005

Respectfully submitted,

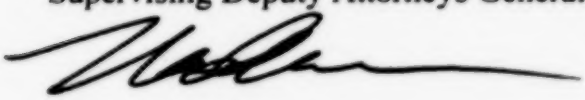
BILL LOCKYER
Attorney General of the State of California

MANUEL M. MEDEIROS
State Solicitor General

ROBERT R. ANDERSON
Chief Assistant Attorney General

MARY JO GRAVES
Senior Assistant Attorney General

JANET E. NEELEY
WARD A. CAMPBELL
Supervising Deputy Attorneys General



MATHEW CHAN
Deputy Attorney General
Counsel of Record

Counsel for Petitioner

(5)

FEB 22 2005

No. 04-563

In the Supreme Court of the United States

DENEICE A. MAYLE, WARDEN, PETITIONER

v.

JACOBY LEE FELIX

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

PAUL D. CLEMENT
Acting Solicitor General
Counsel of Record

CHRISTOPHER A. WRAY
Assistant Attorney General

MICHAEL R. DREEBEN
Deputy Solicitor General

LISA S. BLATT
Assistant to the Solicitor General

RICHARD A. FRIEDMAN
Attorney

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether, under Federal Rule of Civil Procedure 15(c)(2), an amended habeas petition that is filed after the one-year limitation period under 28 U.S.C. 2244(d)(1) relates back to the date of an original timely filed habeas petition, simply because the amended petition asserts claims arising from the same trial and conviction that the prisoner attacked in the original petition.

TABLE OF CONTENTS

	Page
Interest of the United States	1
Relevant statutory provisions	2
Statement	2
Summary of argument	7
Argument:	
An amended post-conviction pleading relates back to an original pleading when the amended pleading arises from the conduct, transaction, or occurrence that is the basis for relief set forth in the original pleading	10
A. Federal Rule 15(c)(2) permits relation back in post-conviction proceedings when an amended claim arises from the grounds for relief and supporting facts that are required to be set forth in the original pleading	11
B. The court of appeals' interpretation of Rule 15(c)(2) conflicts with the purposes of AEDPA's one-year time limit	16
C. The court of appeals' holding conflicts with the notice principle of Rule 15(c)(2)	22
Conclusion	27
Appendix	1a

TABLE OF AUTHORITIES

Cases:

Anthony v. *Cambra*, 236 F.3d 568 (9th Cir. 2000), cert. denied, 533 U.S. 941 (2001)	24
Baldwin County Welcome Ctr. v. *Brown*, 466 U.S. 147 (1984)	9, 22, 25
Baldwin v. *Reese*, 124 S. Ct. 1347 (2004)	22
Brannigan v. *United States*, 249 F.3d 584 (7th Cir.), cert. denied, 534 U.S. 874 (2001)	26
Becker v. *Montgomery*, 532 U.S. 757 (2000)	15

Cases—Continued: Page

Calderon v. *Thompson*, 523 U.S. 538 (1988) 21
Carey v. *Saffold*, 536 U.S. 214 (2002) 22
Chavez v. *Martinez*, 538 U.S. 760 (2003) 15
Conley v. *Gibson*, 355 U.S. 41 (1957) 22, 25
Davenport v. *United States*, 217 F.3d 1341 (11th Cir. 2000), cert. denied, 532 U.S. 907 (2001) 7, 18
Duncan v. *Walker*, 533 U.S. 167 (2001) 16, 18
Edelman v. *Lynchburg Coll.*, 535 U.S. 106 (2002) 15
Ellzey v. *United States*, 324 F.3d 521 (7th Cir. 2003) 6, 20, 21, 25
Engle v. *Isaac*, 456 U.S. 107 (1982) 21, 22
Felker v. *Turpin*, 518 U.S. 651 (1996) 26
Fama v. *Commissioner of Corr. Servs.*, 235 F.3d 804 (2d Cir. 2000) 2
Foman v. *Davis*, 371 U.S. 178 (1962) 12, 21
Johnson v. *United States*, 196 F.3d 802 (7th Cir. 1999) 20
McNeil v. *Wisconsin*, 501 U.S. 171 (1991) 15
Missouri, Kan. & Tex. Ry. v. *Wulf*, 226 U.S. 570 (1913) 23
New York Cent. & H.R.R. v. *Kinney*, 260 U.S. 340 (1922) 23
Parklane Hosiery Co. v. *Shore*, 439 U.S. 322 (1979) 26
Pitchess v. *Davis*, 421 U.S. 482 (1975) 12
Rotella v. *Wood*, 528 U.S. 549 (2000) 21
Scarborough v. *Principi*, 124 S. Ct. 1856 (2004) 22, 23
Schiavone v. *Fortune*, 477 U.S. 21 (1986) 25
Schlup v. *Delo*, 513 U.S. 298 (1995) 22
Smith v. *Murray*, 477 U.S. 527 (1986) 21
Tiller v. *Atlantic Coast Line R.R.*, 323 U.S. 574 (1945) 23
United States v. *Duffus*, 173 F.3d 333 (3d Cir.), cert. denied, 528 U.S. 866 (1999) 7, 17, 18, 21
United States v. *Espinoza-Saenz*, 235 F.3d 501 (10th Cir. 2000) 7, 18

Cases—Continued: Page

United States v. *Hicks*, 283 F.3d 380 (D.C. Cir. 2002) 7, 15, 17, 24
United States v. *Pittman*, 209 F.3d 314 (4th Cir. 2000) 7, 11, 17, 18
Williams v. *Taylor*, 529 U.S. 362 (2000) 16
Woodford v. *Garceau*, 538 U.S. 202 (2003) 12, 16, 22
Woodward v. *Williams*, 263 F.3d 1135 (10th Cir. 2001), cert. denied, 535 U.S. 973 (2002) 2

Statutes and rules:

Act of Sept. 28, 1976, Pub. L. No. 94-426, 90 Stat. 1334 13
Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, Tit. I, 110 Stat. 1214:
28 U.S.C. 2244 2
28 U.S.C. 2244(b) 26
28 U.S.C. 2244(b)(1) 26
28 U.S.C. 2244(b)(2) 19, 26
28 U.S.C. 2244(b)(3)(A) 20
28 U.S.C. 2244(d)(1) 1, 2, 3, 10
28 U.S.C. 2244(d)(1)(B)-(D) 24
28 U.S.C. 2244(d)(2) 18
28 U.S.C. 2242 ..... 11, 14
28 U.S.C. 2254 14
28 U.S.C. 2255 ..... 1, 14, 20, 24, 26
Fed. R. Civ. P.:
Rule 15 ..... 2, 21
Rule 15(a) 11, 12, 20, 21
Rule 15(c) 6, 8, 11, 12, 14, 20, 25
Rule 15(c)(2) ..... *passim*
Rule 60(b) 13
Rule 81(a)(2) 12
Fed. R. Crim. P. 32(k)(1) 17
Rules Governing Section 2254 Cases:
Rule 2 2
Rule 2(c) 13

Rules—Continued:	Page
Rule 2(c)(1)	8, 14
Rule 2(c)(2)	8, 14
Rule 2(d)	14
Rule 2(e)	17
Rule 11	12
Rules Governing Section 2255 Proceedings:	
Rule 2(b)(1)	8, 14
Rule 2(b)(2)	8, 14
Rule 2(c)	14
Rule 2(d)	17
Rule 12	12
Miscellaneous:	
Bureau of Justice Statistics, U.S. Dep't of Justice, *Federal Habeas Corpus Review* (1995)	19
6A Charles A. Wright, et al., *Federal Practice and Procedure: Civil 2d* (1990)	23, 24
H.R. Rep. No. 1471, 94th Cong., 2d Sess. (1976)	13

In the Supreme Court of the United States

No. 04-563

DENEICE A. MAYLE, WARDEN, PETITIONER

v.

JACOBY LEE FELIX

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

The court of appeals held that a state prisoner's amended habeas petition that is filed after the one-year limitation period under 28 U.S.C. 2244(d)(1) relates back to the filing of an original timely filed habeas petition under Federal Rule of Civil Procedure 15(c)(2), simply because the amended petition was based on claims arising from the same trial and conviction under attack in the original petition. A similar one-year limitation period applies to collateral challenges to federal convictions under 28 U.S.C. 2255 ¶ 6, and the lower courts have held that the doctrine of relation back applies equally to proceedings under Section 2254 and under Section 2255. *E.g.*, Pet. App. A4 n.1;

Woodward v. *Williams*, 263 F.3d 1135, 1142 (10th Cir. 2001), cert. denied, 535 U.S. 973 (2002); *Fama* v. *Commissioner of Corr. Servs.*, 235 F.3d 804, 816 (2d Cir. 2000). Because the Court's ruling will apply to collateral attacks on federal criminal judgments, the United States has a substantial interest in the outcome of this case.

RELEVANT STATUTORY PROVISIONS

The relevant provisions of 28 U.S.C. 2244, Rule 2 of the Rules Governing Section 2254 Cases, and Rule 15 of the Federal Rules of Civil Procedure are set forth in an appendix to the brief. App., *infra*, 1a-5a.

STATEMENT

Following a jury trial in California state court, respondent was convicted of first degree murder and sentenced to life imprisonment without the possibility of parole. The California Court of Appeal affirmed and the California Supreme Court denied review. Respondent subsequently brought a timely petition for a writ of habeas corpus in the United States District Court for Eastern District of California. He later amended the petition to add new claims after the expiration of the one-year limitation period under 28 U.S.C. 2244(d)(1). The district court dismissed the new claims as time-barred. The United States Court of Appeals for the Ninth Circuit reversed that dismissal, ruling that the amended petition related back for statute of limitation purposes to the date of respondent's initial habeas petition.

1. In 1995, respondent was convicted in California state court of first degree murder and second degree robbery of Richard Harper, and was sentenced to life imprisonment without the possibility of parole. The focus of the prosecution's case at trial was a videotaped

interview given by Kenneth Williams in which Williams reported to police the following events. On September 21, 1993, just before the robbery and murder of Harper, Williams overheard respondent, who had an automatic weapon, speaking with two other individuals, Lawson and Curtis, about a plan to rob Harper to steal marijuana from him. Williams saw the three men go around the corner. Two minutes later he heard six or seven shots. Williams then observed respondent and Curtis getting into and driving Harper's vehicle. Williams again saw the trio a short time later going through Harper's car. When Williams asked respondent whether he shot Harper, respondent replied, "I think so." Pet. App. C5. Williams testified at trial but denied having any memory of his interview with the police, despite being shown videotaped excerpts of that interview in front of the jury. *Id.* at C4.

Another witness also testified at trial that he overheard respondent state that a woman might have seen respondent on the night of the robbery and that respondent was "going back to smoke [shoot] her." Pet. App. C4. The State also introduced pre-trial statements to police that were made by respondent and Lawson, who each gave false or contradictory statements about their activities during the evening of the robbery and murder.

The California Court of Appeal affirmed respondent's conviction. The California Supreme Court declined further review. Respondent's conviction became final on August 12, 1997. Pet. App. A5.

2. On May 8, 1998, within the one-year limitation period for filing a petition for a writ of habeas corpus under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. 2244(d)(1), respondent filed in federal district court a pro se petition for a writ

of habeas corpus. The petition raised three claims that respondent had exhausted on direct appeal: that the admission into evidence of Williams's videotaped testimony violated respondent's rights under the Confrontation Clause of the Sixth Amendment; that the judge had erred in instructing the jury; and that there was insufficient evidence to support the conviction. Pet. App. A5, G1-G7.

On May 29, 1998, a magistrate judge ordered the appointment of counsel. Pet. App. C6, H2. On August 11, 1998, the AEDPA one-year limitation period expired. *Id.* at A5.

On January 28, 1999, five months after the expiration of AEDPA's time limit, respondent's counsel filed an amended petition that reiterated his Confrontation Clause claim but deleted the instructional error and insufficient evidence claims. The amended petition also contained two new claims: that the police used coercive tactics during his pre-trial interrogation such that the admission at trial of his pre-trial statements violated his due process rights under the Fourteenth Amendment and his right against self-incrimination under the Fifth Amendment, and that respondent's counsel was ineffective in failing to raise that coerced confession claim on direct appeal. Pet. App. A5, C6, I4-I19. The State moved to dismiss the new claims for failure to exhaust, but that motion was vacated at the request of the State after respondent had exhausted the claims in state court. *Id.* at C6-C7.

In February 2001, the magistrate judge issued findings and recommendations concluding that the coerced confession and ineffective-assistance-of-counsel claims should be dismissed as time-barred, because the amended petition raising those claims was not filed until after the expiration of AEDPA's one-year

limitation period. The magistrate judge observed that Federal Rule of Civil Procedure 15, which governs the amendment of pleadings, applies to habeas corpus actions, but that Rule 15(c)(2) does not permit an amended pleading to relate back to the date of the original pleading unless "the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading." Pet. App. C14. The magistrate judge further explained that relation back was not warranted in this case on the theory that the original and amended claims "are based on the same criminal conviction." *Id.* at C16. Rather, the magistrate judge concluded, "[t]he claims * * * which concern [respondent's] allegedly involuntary statements to police do not arise out of the same conduct, transaction, or occurrence as the videotaped interrogation of Kenneth Williams." *Ibid.* Addressing respondent's timely Confrontation Clause on the merits, the magistrate judge recommended that it be dismissed. *Id.* at C18- C45.

In June 2002, the district court dismissed respondent's amended claims as time-barred and dismissed respondent's Confrontation Clause claim on the merits, relying on the magistrate judge's findings and recommendations. Pet. App. B1-B3. The district court subsequently issued a certificate of appealability for both the Confrontation Clause and the amended claims. *Id.* at A6.

3. A divided panel of the Ninth Circuit affirmed the district court's dismissal of respondent's Confrontation Clause claim but reversed the dismissal of his coerced confession claim and remanded that claim to the district court for further proceedings. Pet. App. A1-A19. The court of appeals recognized that the timeliness of the

coerced confession claim, which was raised in an amended petition after the expiration of AEDPA's one-year time limit, turned on whether that claim arose from the "conduct, transaction, or occurrence" set forth in respondent's original petition within the meaning of Rule 15(c)(2)'s relation back rule. Pet. App. A4. Holding that "the transaction or occurrence" raised in respondent's original habeas petition was the "trial and conviction" under attack, the court of appeals concluded that the amended petition related back to the filing of the original petition. *Id.* at A4, A6, A7. In so holding, the court of appeals expressed its agreement (*id.* at A7) with the decision of the Seventh Circuit in *Ellzey* v. *United States*, 324 F.3d 521, 526 (2003).[1]

The Ninth Circuit reasoned that its holding was supported by a "literal application" of Rule 15(c). Pet. App. A6. The court also opined that respondent's original petition "brought his trial and conviction to the attention of the State," and thus had fairly put the State on notice that respondent might amend his petition to challenge other "allegedly unconstitutional rulings at trial." *Id.* at A10. The Ninth Circuit disagreed (*id.* at A8) with the majority of courts of appeals that have concluded that construing "conduct, transaction, or occurrence" to refer to a prisoner's conviction would impermissibly undermine AEDPA's one-year limit by invariably permitting expired claims to relate

[1] The court of appeals did not explicitly rule on the timeliness of respondent's claim of ineffective assistance of counsel on appeal, but the decision appears to have treated that claim as part of respondent's coerced confession claim because respondent's amended habeas petition combined the two theories as one ground for relief from his conviction. Pet. App. I4-I19.

back to a timely filed post-conviction pleading.[2] The court of appeals reasoned that "AEDPA * * * still requires the original petition to be filed within the one-year period." *Ibid.*

Judge Tallman dissented. Pet. App. A13-A19. He explained that to define "conduct, transaction, or occurrence" under Rule 15(c)(2) "so broadly that any claim stemming from pre-trial motions, the trial, or sentencing relates back to a timely-filed habeas petition" would "obliterate[] AEDPA's one year statute of limitation." Pet. App. A13. In Judge Tallman's view, "[w]hile an amendment offered to clarify or amplify the facts already alleged in support of a timely claim may relate back, an amendment that introduces a new legal theory based on facts different from those underlying the timely claim may not." *Id.* at A18.

SUMMARY OF ARGUMENT

A prisoner cannot rely on the doctrine of relation back, under Federal Rule of Civil Procedure 15(c)(2), to render timely under the AEDPA's limitation period an otherwise untimely amendment to an original habeas petition, when the amendment articulates new grounds for relief and supporting facts that differ from those alleged in the original petition.

A. Federal Rule of Civil Procedure 15(c)(2) permits relation back of an otherwise untimely pleading when "the claim * * * asserted in the amended pleading arose out of the conduct, transaction, or occurrence set

[2] See *United States* v. *Hicks*, 283 F.3d 380, 388 (D.C. Cir. 2002); *United States* v. *Espinoza-Saenz*, 235 F.3d 501, 505 (10th Cir. 2000); *Davenport* v. *United States*, 217 F.3d 1341, 1346 (11th Cir. 2000), cert. denied, 532 U.S. 907 (2001); *United States* v. *Pittman*, 209 F.3d 314, 318 (4th Cir. 2000); *United States* v. *Duffus*, 174 F.3d 333, 337-338 (3d Cir.), cert. denied, 528 U.S. 866 (1999).

forth or attempted to be set forth in the original pleading." In the post-conviction setting, the "conduct, transaction, or occurrence" set forth in an original post-conviction pleading refers to the conduct or event that is the basis for the prisoner's collateral attack, *i.e.*, the specific grounds for collateral relief and supporting facts that are set forth in the original pleading. The Rules governing post-conviction proceedings require an original post-conviction pleading to set forth all grounds for relief and supporting facts available to the prisoner. Rule 2(c)(1) and (2) of the Rules Governing Section 2254 Cases (Section 2254 Rules); Rule 2(b)(1) and (2) of the Rules Governing Section 2255 Proceedings (Section 2255 Rules). Because relation back under Rule 15(c)(2) requires that any claim asserted in an amended pleading must arise from the "conduct, transaction, or occurrence" that is set forth in the original pleading, the phrase "conduct, transaction, or occurrence" logically refers to the grounds for relief and supporting facts that the prisoner was required to set forth in his original pleading.

Under that approach to Rule 15(c) in the post-conviction setting, relation back principles allow a prisoner to cure technical deficiencies of form in the original pleading; to add legal theories based on a set of facts previously identified in the original pleading; and to clarify or amplify facts set forth in the original pleading. The prisoner cannot, however, rely on relation back to save an otherwise untimely pleading if the amended pleading asserts both new grounds for relief and a different set of facts than those set forth in the prisoner's original pleading.

Applying that analysis, respondent's claims of coerced confession and ineffective assistance of counsel on appeal are time barred because they do not arise out

of any conduct, transaction, or occurrence that is specified in respondent's original petition. Those claims rely on new legal theories and different events and conduct than those identified in respondent's original petition, which concerned the admission of extra-judicial testimony of a government witness, instructional error, and insufficient evidence. The amended petition accordingly does not relate back under Rule 15(c)(2).

B. The Ninth Circuit's view that the relevant "conduct, transaction, or occurrence" is the prisoner's trial and conviction conflicts with the central purpose of the AEDPA's one-year time limit: to promote the finality of criminal convictions. Because an original petition will almost always be based on a prisoner's underlying conviction, the rule embraced by the Ninth Circuit would invariably permit relation back of untimely claims no matter how disparate the amended claims were in both time and type from the claims set forth in the original petition. That rule of virtually automatic relation back would substantially extend the time in which to raise new collateral attacks well beyond AEDPA's one-year limit and would undermine the principles of finality, federalism, and comity that animated the passage of the AEDPA.

C. The conclusion that Rule 15(c)(2) permits relation back only when the amended pleading arises from the grounds for relief and supporting facts set forth in the prisoner's original post-conviction pleading is confirmed by the notice principle that serves as the foundation for the relation-back doctrine. When an amended pleading asserts a claim of which the original pleading gave fair notice, there is no cause to assert a limitation period as a bar to relief. *Baldwin County Welcome Ctr.* v. *Brown*, 466 U.S. 147, 150 n.3 (1984). Thus, when an amended post-conviction pleading arises from the

grounds for relief and supporting facts stated in a timely pleading, permitting the amended pleading to relate back is consistent with principles of fair notice. By contrast, the rule adopted by the Ninth Circuit would permit an amended pleading to relate back even in cases such as the present one, where the original pleading provided no notice of the newly asserted basis for relief.

ARGUMENT

AN AMENDED POST-CONVICTION PLEADING RELATES BACK TO AN ORIGINAL PLEADING WHEN THE AMENDED PLEADING ARISES FROM THE CONDUCT, TRANSACTION, OR OCCURRENCE THAT IS THE BASIS FOR RELIEF SET FORTH IN THE ORIGINAL PLEADING

Following the expiration of AEDPA's one-year limitation period, 28 U.S.C. 2244(d)(1), respondent filed an amended habeas corpus petition that claimed that the admission at trial of respondent's pre-trial confession violated his due process rights because his confession was coerced by police and that counsel was ineffective on appeal in failing to press the coerced confession claim. It is undisputed that those claims are time-barred unless they relate back to respondent's timely filed original petition that raised Confrontation Clause, instructional error, and evidence insufficiency claims.

According to the rule adopted by the Ninth Circuit, respondent's amended claims relate back to the date of his original petition because the "conduct, transaction, or occurrence" contemplated by Rule 15(c)(2) in this context is respondent's conviction, and because the original and amended claims arise from the same criminal conviction. As illustrated by this csae, such a

rule would permit relation back of untimely claims that would include *any* pre-trial, trial, or post-trial error that would provide a basis for challenging the conviction. That approach "views 'occurrence' at too high a level of generality," *United States* v. *Pittman*, 209 F.3d 314, 318 (4th Cir. 2000), and is inconsistent with the rules governing post-conviction proceedings, the policies of finality, comity, and federalism underlying the AEDPA's one-year limitation period, and the requirement of fair notice that is embodied in Rule 15(c). Properly construed, the Rule 15(c)(2) "conduct, transaction, or occurrence" out of which the amended petition must arise refers to the specific conduct, transaction, or occurrence that is the basis for a prisoner's legal challenge as set forth in his original habeas petition. Because respondent's original petition gave the State no notice that respondent was challenging the introduction of his pre-trial confession, much less his counsel's effectiveness of assistance on appeal, respondent's amended claims do not relate back to his original petition and are time-barred.

A. Federal Rule 15(c)(2) Permits Relation Back In Post-Conviction Proceedings When An Amended Claim Arises From The Grounds For Relief And Supporting Facts That Are Required To Be Set Forth In The Original Pleading

1. An "[a]pplication for a writ of habeas corpus" "may be amended or supplemented as provided in the rules of procedure applicable to civil actions." 28 U.S.C. 2242. Rule 15(a) of the Federal Rules of Civil Procedure provides that a party may amend a pleading after the opposing party has filed a responsive pleading "only by leave of court" or by consent of the adverse party, but "leave shall be freely given when justice so

requires." Rule 15(a) addresses when an amendment should be permitted, see *Foman* v. *Davis*, 371 U.S. 178, 182 (1962), but subsection (a) does not address whether an amended pleading that raises a new claim is nonetheless barred by an applicable statute of limitation. That issue is addressed by Rule 15(c), which provides in pertinent part that "[a]n amendment of a pleading relates back to the date of the original pleading when * * * the claim * * * asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading." Fed. R. Civ. P. 15(c)(2).

Rule 15(c)(2), however, cannot be applied to post-conviction pleadings in a manner that conflicts with the statutes and rules governing post-conviction proceedings. Federal Rule of Civil Procedure 81(a)(2) states that the Federal Rules of Civil Procedure apply to "proceedings for * * * habeas corpus * * * to the extent that the practice in such proceedings is not set forth in * * * the Rules Governing Section 2254 Cases, or the Rules Governing Section 2255 Proceedings." Similarly, Rule 11 of the Section 2254 Rules and Rule 12 of the Section 2255 Rules provide that the Federal Rules of Civil Procedure, "to the extent that they are not inconsistent with any statutory provisions or these rules, may be applied to a proceeding under these rules."[3] See also *Woodford* v. *Garceau*, 538 U.S. 202, 208 (2003) ("The Federal Rules of Civil Procedure apply in the context of habeas suits to the extent that they are not inconsistent with the Habeas Corpus Rules."); *Pitchess* v. *Davis*, 421 U.S. 482, 489 (1975) (per

[3] All citations to the Section 2254 Rules and Section 2255 Rules refer to the version that became effective on December 1, 2004. http://www.uscourts.gov/rules/index.html#congressional120104.

curiam) (holding Federal Rule of Civil Procedure 60(b) does not trump exhaustion requirement under Section 2254).

2. As stated, Rule 15(c)(2) permits relation back of an amended pleading when the claim asserted in the amended pleading "arose out of the conduct, transaction, or occurrence set forth * * * in the original pleading." Fed. R. Civ. P. 15(c)(2). In the context of an original pleading that collaterally attacks a criminal conviction, the phrase "conduct, transaction, or occurrence" refers to whatever conduct, event, or occurrence is alleged as the basis for the initial pleading's attack on the conviction, *i.e.*, the specific grounds for relief and supporting facts that are set forth in the original pleading. That conclusion best comports with the Section 2254 Rules and the Section 2255 Rules, which govern the content and form for post-conviction pleadings. Those rules reflect Congress's unambiguous intent that the original post-conviction pleading (*i.e.*, a petition for a writ of habeas corpus under Section 2254 or a motion to vacate, set aside, or correct a sentence under Section 2255) particularize the specific grounds for relief and supporting facts for the collateral challenge to the prisoner's conviction.[4]

Rule 2 requires that a prisoner's petition or motion must "specify all the grounds for relief available" to the prisoner and "state the facts supporting each ground."

[4] Rule 2's specificity requirement was contained in the original Rules that were drafted by the Advisory Committee in 1976, were transmitted to Congress by this Court by Order of April 26, 1976, and were approved by Congress after "careful study." H.R. Rep. No. 1471, 94th Cong., 2d Sess. 2 (1976); see also Pub. L. No. 94-426, 90 Stat. 1334; Advisory Committee Notes to Section 2254 Rule 2, 1976 Adoption (Rule 2(c) "requires that all available grounds for relief be presented in the petition.").

Section 2254 Rule 2(c)(1) and (2); Section 2255 Rule 2(b)(1) and (2). The Model Form accompanying the Rules contains similar instructions as well as a cautionary statement that "[i]f you fail to set forth all the grounds" in the original pleading, "you may be barred from presenting additional grounds at a later date." Appendix of Forms for Petitions under 28 U.S.C. 2254 and Motions under Section 2255 (Instructions § 9, Model Form ¶ 12); see also Section 2254 Rule 2(d) and Section 2255 Rule 2(c) (requiring that original pleading "must substantially follow either the form appended to these rules" or form prescribed by local district-court rules).

For those reasons, the "conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading" in a Section 2254 or Section 2255 proceeding is not a prisoner's "trial and conviction," as held by the court of appeals. Pet. App. A4, A6, A7. Rather, the phrase, in this context, refers to the particular conduct, event, or occurrence that serves as the ground for relief and supporting facts that the post-conviction Rules require the prisoner to specify in his original pleading. Accordingly, an amended post-conviction pleading relates back to the date of the original pleading under Rule 15(c)(2) only if the amended claim arises from the grounds and set of facts identified in the prisoner's original pleading.

That conclusion does not render Rule 15(c)'s relation-back principle "meaningless in the habeas context," as suggested by the Ninth Circuit. Pet. App. A7-A8, A9. For instance, relation back is appropriate when the amended pleading cures a technical or form deficiency in an original pleading, such as a missing signature. See Advisory Committee Notes to 2004 Amendments to Rules 2 and 3 of the Section 2254 Rules and Section

2255 Rules (explaining amendments that require clerks to accept defective motions so that prisoner can later file corrected motion); cf. *Edelman* v. *Lynchburg Coll.*, 535 U.S. 106 (2002) (permitting relation back of verification requirement under Title VII); *Becker* v. *Montgomery*, 532 U.S. 757 (2001) (permitting relation back of signature requirement for notice of appeal).

Relation back also is appropriate if the amended pleading adds a new legal theory that is based on the same set of facts that were specified in the original post-conviction pleading, *i.e.* the particular occurrences or conduct challenged in the original pleading. Cf. *Chavez* v. *Martinez*, 538 U.S. 760 (2003) (rejecting self-incrimination clause challenge but remanding for substantive due process analysis of same conduct); *McNeil* v. *Wisconsin*, 501 U.S. 171, 175-179 (1991) (reviewing validity of admission of confession under Fifth and Sixth Amendments). Relation back is also appropriate if an amended pleading clarifies or amplifies facts to support the specific grounds that were raised in the original pleading. As Judge Edwards has explained in the D.C. Circuit's decision in *United States* v. *Hicks*, 283 F.3d 380, 388 (2002), "an amendment offered for the purpose of adding [to] or amplifying the facts already alleged in support of a particular claim may relate back." Conversely, an amendment "that attempts to introduce a new legal theory based on facts different from those underlying the timely claims may not." *Id.* at 389; accord Pet. App. A18 (Tallman, J. dissenting).

3. Under the above principles, respondent's amended petition does not arise out of any "conduct, transaction, or occurrence" that was raised in respondent's original petition. Respondent's timely original petition raised three grounds for relief from his state court conviction: the admission of Williams' out-of-court

statement, instructional error, and insufficiency of the evidence. Pet. App. G6. The new claims raised in the amended petition, filed after the AEDPA's one-year limitation period, abandoned the latter two claims and raised entirely new grounds for relief based on a completely different set of facts: the admission of respondent's allegedly coerced confession and counsel's alleged ineffective assistance on appeal for failure to raise the coerced confession claim. "Here, it simply cannot be said that [the original and amended] claims arise from the same set of facts; rather, they arise from distinctly separate occurrences of both time and type." *Id.* at A18 (Tallman, J., dissenting); accord *id.* at D9 (magistrate judge's recommended findings) ("Obviously, the theories and facts of the claims are distinct."). Respondent's untimely amended petition therefore should have been dismissed as time-barred under the AEDPA's one-year time limit.

B. The Court Of Appeals' Interpretation Of Rule 15(c)(2) Conflicts With The Purposes Of AEDPA's One-Year Time Limit

1. "Congress enacted AEDPA to reduce delays in the execution of state and federal criminal sentences, particularly capital cases," and "to further the principles of comity, finality, and federalism." *Woodford* v. *Garceau*, 538 U.S. 202, 206 (2003) (quoting *Willams* v. *Taylor*, 529 U.S. 362, 386, 436 (2000)). In particular, the AEDPA's one-year limitation period "quite plainly serves the well-recognized interest in the finality" of criminal judgments by "restricting the time that a prospective federal habeas petitioner has in which to seek federal habeas review." *Duncan* v. *Walker*, 533 U.S. 167, 179 (2001). Those purposes are best served by permitting relation back of an amendment that is filed

beyond AEDPA's one-year limitation period only when the amendment arises out of the grounds and set of facts set forth in an original timely filed pleading. That rule is "faithful * * * to the concerns about drawn-out and unlimited collateral attacks on federal criminal judgments evinced by the passage of AEDPA." *Hicks*, 283 F.3d at 389; accord *United States* v. *Duffus*, 174 F.3d 333, 338 (3d Cir.) ("A prisoner should not be able to assert a claim otherwise barred by the statute of limitations merely because he asserted a separate claim within the limitations period."), cert. denied, 528 U.S. 866 (1999).

By contrast, a rule that the "conduct, transaction, or occurrence" is the prisoner's trial and conviction "would be difficult to square with Congress' decision to expedite collateral attacks by placing stringent time restrictions" on Section 2254 petitions and Section 2255 motions. *Hicks*, 283 F.3d at 388. The Ninth Circuit's rule would mean that amendments "would almost invariably be allowed even after the statute of limitations has expired, because most [collateral] claims arise from a criminal defendant's underlying conviction and sentence." *Pittman*, 209 F.3d at 318; *Hicks*, 283 F.3d at 388 ("In most cases, a prisoner's claims for relief will arise out of the same criminal conviction; if the defendant's trial and sentencing are construed to be the 'occurrence,' virtually any purported amendment will relate back."); see also Section 2254 Rule 2(e) and Section 2255 Rule 2(d) (requiring separate petitions or motions for separate judgments under attack).

Because a judgment of conviction generally embodies the jury verdict or plea *and* the sentence, see, *e.g.*, Fed. R. Crim. P. 32(k)(1), the rule embraced by the Ninth Circuit would significantly extend the one-year limitation period with respect to *any* new grounds for relief

or supporting set of facts that arise out of the conviction at issue, even though the new grounds and facts were not set forth in the original petition. "By defining 'conduct, transaction, or occurrence' so broadly that any claim stemming from pre-trial motions, the trial, or sentencing relates back to a timely-filed habeas petition," the Ninth Circuit's rule would permit "the 'relation-back' doctrine to swallow AEDPA's statute of limitation, rendering it a virtual nullity through which an unlimited number of amendments must be liberally permitted so long as the original collateral attack was timely filed." Pet. App. A13, A16 (Tallman, J., dissenting) (footnote omitted); see also *United States* v. *Espinoza-Saenz*, 235 F.3d 501, 505 (10th Cir. 2000) ("[T]o allow amendment under that broad umbrella would be tantamount to judicial rescission of AEDPA's statute of limitations period."); accord *Davenport* v. *United States*, 217 F.3d 1341, 1346 (11th Cir. 2000), cert. denied, 532 U.S. 907 (2001); *Pittman*, 209 F.3d at 318; *Duffus*, 174 F.3d at 337-338.

In *Duncan*, this Court refused to adopt an interpretation of the AEDPA that would permit a state prisoner's filing of a federal habeas petition to count as a post-conviction filing that tolls the one-year limitation period under Section 2244(d)(2) because that interpretation "would hold greater potential to hinder finality." 533 U.S. at 178. The Ninth Circuit's interpretation similarly should be rejected because it "would hold greater potential to hinder finality." *Ibid.* The Ninth Circuit's holding would permit indefinite relation back for untimely claims arising out of the prisoner's conviction so long as the case remains pending. That time period in many instances would last well beyond the expiration of AEDPA's one-year limit.

For instance, in a sample of habeas actions disposed of during 1992, the average (mean) number of days to resolve the case on the merits in district court was 477 days, and that number was 925 days for multiple-issue habeas petitions involving a sentence of death. Bureau of Justice Statistics, U.S. Dep't of Justice, *Federal Habeas Corpus Review* 23-25 (1995). Even the median case processing time for all habeas cases, including those not addressed on the merits, was about 6 months, with 10% taking more than 761 days to resolve. *Id.* at 19-20; see also Pet. App. A16 n.2 (Tallman, J., dissenting) (observing that respondent's case was pending for four years before the district court resolved respondent's Confrontation Clause claim on the merits). Thus, by embracing a rule that would invariably lead to relation back of untimely claims as long as they arose out of the prisoner's conviction, the net effect of the Ninth Circuit's rule would be to extend the limitations period for filing collateral challenges substantially beyond the time period specified by Congress.

2. The Ninth Circuit believed that its holding was tempered by the fact that a prisoner who delays the filing of an amended petition runs the risk that the district court will have already entered judgment on the merits with respect to the original petition and the prisoner therefore will have to meet the more stringent requirements for bringing a second or successive petition under 28 U.S.C. 2244(b)(2). Pet. App. A8-A9 n.2. As discussed, however, a considerable amount of time may pass before a court resolves a prisoner's original claim or claims. Moreover, because the amount of time to resolve any given collateral attack will vary in light of the complexity of the case and docket of the district court, the Ninth Circuit's approach would create anomalies and inequities that could not have

been intended by Congress. A prisoner seeking relief from a conviction before a district court that promptly enters final judgment with respect to the original petition not only will have to raise any additional challenges to his conviction under the strict requirements for second and successive petitions, *ibid.*, but he also will have to comply with the one-year limitation period with respect to any additional claims. By contrast, a similarly-situated prisoner whose case is pending before a court that takes a longer time to act on an original petition is free to mount additional and effectively consecutive attacks on the conviction without regard to AEDPA's one-year time limit or the Act's provisions on second or successive petitions. There is no basis for reading Rule 15(c) to create such disparate treatment.[5]

---

[5] The court of appeals in *Ellzey*, 324 F.3d at 526, stated that, under the government's view of Rule 15(c), post-conviction "pleadings could not be amended at all," even if filed within the one-year limit, "for a successive collateral attack requires prior appellate approval" under 28 U.S.C. 2244(b)(3)(A) and 2255 ¶ 8. That suggestion is unfounded. As long as a post-conviction proceeding is pending, all *timely* amendments may be filed under Rule 15(a) without becoming a second or successive filing under AEDPA. *Johnson* v. *United States*, 196 F.3d 802, 805 (7th Cir. 1999) ("A prisoner receives one complete round of litigation, which as in other civil suits includes the opportunity to amend a pleading before judgment."). That conclusion holds true even where the amended petition raises claims based on different grounds and facts from the original petition, so long as the amendment is filed within the limitations period. Rule 15(a) does not require any "conduct, transaction, or occurrence" connection between the original and amended claims, and Rule 15(c)(2) is relevant only when the amended petition is filed after the expiration of the limitations period.

The Ninth Circuit also attempted to justify its holding on the theory that "abuses of [Federal Rule of Civil Procedure] 15 can be controlled by the district court under subsection (a), which requires leave of court to file an amendment after a responsive pleading has been filed." Pet. App. A9; see also *Ellzey*, 324 F.3d at 527. As the Ninth Circuit recognized, Pet. App. A9 n.3, however, Federal Rule of Civil Procedure 15(a) requires leave to be "freely given," and will be typically given absent prejudice to the opposing party or other similar circumstances. *Foman* v. *Davis*, 371 U.S. at 182. More importantly, permitting relation back of an otherwise proper amendment under Rule 15(a) (*i.e.*, because there is no prejudice to the government) would nonetheless substantially extend AEDPA's one-year limit and therefore would "thwart[] the basic objective of repose underlying the very notion of a limitations period." *Rotella* v. *Wood*, 528 U.S. 549, 554 (2000); *Duffus*, 174 F.3d at 338 (recognizing principle "that usually statutes of limitations operate without taking prejudice from delay into account").

The harm to the principle of repose is particularly acute in the post-conviction setting where a prisoner attacks an otherwise final criminal conviction. By interfering with the finality of criminal judgments, collateral review of criminal convictions entails "profound societal costs." *Calderon* v. *Thompson*, 523 U.S. 538, 554 (1998) (quoting *Smith* v. *Murray*, 477 U.S. 527, 539 (1986)). Such review "extends the ordeal of trial for both society and the accused," *Engle* v. *Isaac*, 456 U.S. 107, 126-127 (1982), and undermines the government's ability to exact retribution for crimes because it prevents the government from executing the moral judgments reflected in criminal convictions, *Thompson*, 523 U.S. at 556. The absence of finality also frustrates deterrence

and rehabilitation. Effective deterrence depends on the expectation that punishment will be swift and sure, and successful rehabilitation requires the defendant to accept that he is justly subject to sanction and that he needs to be rehabilitated. *Isaac*, 456 U.S. at 127-128 n.32.

Collateral review of state convictions also threatens the other purposes for Congress's enactment of AEDPA—the promotion of comity and federalism. *Woodford* v. *Garceau*, 538 U.S. at 206; *Schlup* v. *Delo*, 513 U.S. 298, 318 (1995). Review of state court judgments by lower federal courts "frustrate[s] both the States' sovereign power to punish offenders and their good faith attempts to honor constitutional rights." *Isaac*, 456 U.S. at 128. The costs to comity and federalism are magnified in cases like the present one in which the prisoner's untimely claims had not been exhausted in state court. *Baldwin* v. *Reese*, 124 S. Ct. 1347, 1351 (2004); *Carey* v. *Saffold*, 536 U.S. 214, 219 (2002).

C. The Court Of Appeal's Holding Conflicts With The Notice Principle Of Rule 15(c)(2)

1. Rule 15(c)(2) is premised on the principle that once an original pleading "'give[s] the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests,'" the defendant "has been given all the notice that statutes of limitations were intended to provide." *Baldwin County Welcome Ctr.* v. *Brown*, 466 U.S. 147, 150 n.3 (1984) (per curiam) (quoting *Conley* v. *Gibson*, 355 U.S. 41, 47, (1957)). Thus, the relation back principle, which was "a well-recognized doctrine" that pre-dated the Federal Rules, *Scarborough* v. *Principi*, 124 S. Ct. 1856, 1867 (2004) (quoting Advisory Committee's 1937 note on Subd. (c) of Fed. R. Civ. P. 15), recognizes that "[w]hen a defendant has had notice

from the beginning that the plaintiff sets up and is trying to enforce a claim against it because of specified conduct, the reasons for the statute of limitations do not exist." *New York Cent. & Hudson River R.R.* v. *Kinney*, 260 U.S. 340, 346 (1922); see, *e.g.*, *Scarborough*, 124 S. Ct. at 1867 (permitting relation back of the "not substantially justified" allegation required by the Equal Access to Justice Act because "the allegation does not serve an essential notice-giving function").

The notice principle that undergirds Rule 15(c)(2) fully supports viewing the "conduct, transaction, or occurrence" as the specific grounds for relief and supporting facts identified by the prisoner in his original pleading. In the ordinary civil context, "amendments that do no more than restate the original claim with greater particularity or amplify the details of the transaction alleged in the preceding pleading fall within Rule 15(c)" because the opposing party has been notified by the original pleading of the gist of the plaintiff's claim. 6A Charles Alan Wright, et al., *Federal Practice and Procedure* § 1497, at 76 (1990) (footnotes omitted). Under similar principles, an amendment that "changes the legal theory on which the action initially was brought" relates back to an original filing "if the factual situation upon which the action depends remains the same and has been brought to defendant's attention by the original pleading." *Id.* at 95 (footnote omitted); See, *e.g.*, *Tiller* v. *Atlantic Coast Line R.R.*, 323 U.S. 574 (1945) (amended Federal Boiler Inspection Act claim related back to timely filed Federal Employers' Liability Act claim based on same train accident that injured the plaintiff).

By contrast, relation back is not appropriate where "the amended petition set[s] up not only a different state of facts, but a different rule of law as the ground

of the action." *Missouri, Kan. & Tex. Ry.* v. *Wulf*, 226 U.S. 570, 577 (1913). Yet the Ninth Circuit's conception of "conduct, transaction, or occurrence" as the conviction under collateral attack would permit relation back in such instances by allowing a prisoner to raise expired claims arising from different pre-trial, trial, or post-trial events of which the original pleading gave the government no notice. As Judge Edwards has cogently explained, where an amended post-conviction pleading raises "an entirely new legal theory that arises from an entirely different set of facts and type of conduct," "the Government would be deprived of 'sufficient notice of the facts and claims giving rise to the proposed amendment,' thus subverting the central policy of the relation back doctrine." *Hicks*, 283 F.3d at 388, 389 (quoting *Anthony* v. *Cambra*, 236 F.3d 568, 576 (9th Cir. 2000), cert. denied, 533 U.S. 941 (2001)).

This case well illustrates the point. There is nothing in respondent's original petition that notified the State that respondent was seeking relief from his conviction based on the court's refusal to suppress incriminating *pre-trial* statements that respondent made to police, much less counsel's alleged ineffectiveness *on appeal*. To permit relation back in that instance would improperly require the State "to prepare the case a second time." Charles Alan Wright et al., *supra*, at 85.[6]

It would also be incorrect to conclude, as suggested by the Ninth Circuit, that an original petition brings an

[6] Respondent was aware of the events giving rise to his coerced confession and ineffective-assistance-of-counsel claims before he filed his original petition. Br. in Opp. 2 n.2 (noting that respondent's counsel objected before trial to the introduction of respondent's pre-trial statements); cf. 28 U.S.C. 2244(d)(1)(B)-(D), 2255 ¶ 6(2)-(3) (providing separate limitations period for certain claims such as newly discovered evidence).

entire "trial and conviction to the attention of the State." Pet. App. A10. As discussed, pp. 13-14, *supra*, the Rules governing collateral challenges require the original pleading to set forth a specific ground for relief and supporting facts. Similarly, a pleading that seeks relief from a conviction based on a mere general allegation of an invalid trial or conviction, without any supporting grounds or facts, would provide the government with no "'notice of what the plaintiff's claim is and the grounds upon which it rests'" and therefore would "not be an original pleading that could be rehabilitated by invoking Rule 15(c)." *Baldwin County Welcome Ctr.*, 466 U.S. at 150 n.4 (quoting *Conley* v. *Gibson*, 355 U.S. at 47). Accordingly, the government may be properly charged with notice of only those grounds for relief and set of supporting facts that were identified in a prisoner's timely-filed pleading. Cf. *Schiavone* v. *Fortune*, 477 U.S. 21, 31 (1986) (observing that under the 1990 version of Rule 15(c), which permitted relation back of an amendment that changes party-defendant, "[t]he linchpin is notice, and notice within the limitations period"). Moreover, the notion that the government is entitled to notice of no more than the bare fact that a habeas petition has been filed is inconsistent with the limitation in Rule 15(c)(2) that relation back not extend beyond the "conduct, transaction, or occurrence" addressed in the original pleading.

3. The Ninth Circuit also expressed the view that its interpretation of Rule 15(c) conformed to principles of res judicata in the civil context such that "anything that would be barred, if not brought now, may be added and litigated" under Rule 15(c)(2). Pet. App. A7 (quoting *Ellzey*, 324 F.3d at 526). The text of Rule 15(c), however, does not mention res judicata, and the two doctrines serve different purposes. Whereas Rule 15(c) is

concerned with fair notice, res judicata furthers principles of judicial economy and the protection of parties from the burdens of repetitious litigation. *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322, 327 (1979).

Moreover, principles of res judicata governing civil cases do not govern post-conviction proceedings. Rather, Congress in AEDPA has enacted a "modified res judicata rule" in AEDPA's provisions dealing with second or successive petitions or motions. *Felker* v. *Turpin*, 518 U.S. 651, 664 (1996); 28 U.S.C. 2244(b), 2255 ¶ 8. Under AEDPA, any "claim" presented in a successive petition or motion that "was presented" in a prior petition or motion must be dismissed, whereas any "claim" that "was not presented" previously will not be dismissed if the claim meets certain gatekeeping requirements. 28 U.S.C. 2244(b)(1) and (2). Those provisions reflect a conception of "claim" that refers to "a challenge to a particular step in the case, such as the introduction of a given piece of evidence, the text of a given jury instruction, or the performance of counsel." *Brannigan* v. *United States*, 249 F.3d 584, 588 (7th Cir.) (Easterbrook, J.), cert. denied, 534 U.S. 874 (2001). The contrary view—that a "claim" refers to the entire trial and conviction—"would imply that every successive collateral attack on a single conviction and sentence must be dismissed." *Ibid.*

AEDPA's second and successive provisions, like the Rules governing post-conviction proceedings generally, thus focus on the particular grounds and supporting facts that are the basis for the prisoner's collateral challenge. Those provisions, like AEDPA's one-year limitation period, all reflect Congress's overarching concern for finality of criminal convictions. The court of appeals' conception of relation back in the post-conviction setting undermines that fundamental concern as

well as the requirement of fair notice that forms the justification for the relation back doctrine under Rule 15(c)(2).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

PAUL D. CLEMENT
Acting Solicitor General

CHRISTOPHER A. WRAY
Assistant Attorney General

MICHAEL R. DREEBEN
Deputy Solicitor General

LISA S. BLATT
Assistant to the Solicitor General

RICHARD A. FRIEDMAN
Attorney

FEBRUARY 2005

APPENDIX

1. Section 2244 of Title 18 U.S.C., provides in relevant part:

Finality of determination

* * * * *

(b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless—

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(3)(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

(4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.

* * * * *

(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

2. Rule 2 of the Rules Governing Section 2254 Cases provides in relevant part:

The Petition

* * * * *

(c) Form. The petition must:

(1) specify all the grounds for relief available to the petitioner;

(2) state the facts supporting each ground;

(3) state the relief requested;

(4) be printed, typewritten, or legibly handwritten; and

(5) be signed under penalty of perjury by the petitioner or by a person authorized to sign it for petitioner under 28 U.S.C. § 2242.

(d) Standard Form. The petition must substantially follow either the form appended to these rules or a form prescribed by a local district-court rule. The clerk must make forms available to petitioners without charge.

(e) Separate Petitions for Judgments of Separate Courts. A petitioner who seeks relief from judgments of more than one state court must file a separate petition covering the judgment of judgments of each court.

3. Federal Rule of Civil Procedure 15 provides in relevant part:

Amended and Supplemental Pleadings

(a) Amendments. A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.

* * * * *

(c) Relation Back of Amendments. An amendment of a pleading relates back to the date of the original pleading when

* * * * *

(2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading * * *.

No. 04-563

IN THE

Supreme Court of the United States

DENEICE A. MAYLE, WARDEN,
Petitioner,

v.

JACOBY LEE FELIX,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF *AMICI CURIAE* HABEAS LAW SCHOLARS ALBERT ALSCHULER, JOHN H. BLUME, ERWIN CHEMERINSKY, ERIC M. FREEDMAN, RANDY HERTZ, JAMES S. LIEBMAN, AND IRA P. ROBBINS IN SUPPORT OF RESPONDENT

SETH P. WAXMAN
DAVID W. OGDEN
Counsel of Record
ALISON J. NATHAN
EDWARD N. SISKEL
KELLY THOMPSON COCHRAN
ARIEL B. WALDMAN
WILMER CUTLER PICKERING
HALE AND DORR LLP
2445 M Street, N.W.
Washington, DC 20037
(202) 663-6000

QUESTION PRESENTED

When a prisoner challenging a state court criminal judgment amends his pending, timely-filed application to a federal district court for a writ of habeas corpus to include a new claim attacking the same judgment as the pending, timely-filed application, does the amendment relate back to the date of the filing of his application and thus satisfy the applicable statute of limitation?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES v

INTEREST OF *AMICI* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. AN AMENDED HABEAS APPLICATION ATTACKING THE SAME JUDGMENT OF CONVICTION OR SENTENCE AS THE ORIGINAL APPLICATION RELATES BACK UNDER FEDERAL RULE OF CIVIL PROCEDURE 15(C) BECAUSE THE JUDGMENT IS THE RELEVANT "TRANSACTION" 5

A. Plain Language Of Rule 15 5

B. Policies Underlying Rule 15(c) 6

C. Rule 15(c)'s Standard As Applied To Amended Habeas Applications 8

II. APPLICATION OF FEDERAL RULE OF CIVIL PROCEDURE 15(C) TO HABEAS CASES IS SPECIFICALLY MANDATED BY 28 U.S.C. § 2242 AND IS NOT INCONSISTENT WITH ANY PROVISION OF FEDERAL LAW 11

III. APPLYING FEDERAL RULE OF CIVIL PROCEDURE 15(C) IN ACCORDANCE WITH THIS COURT'S PRECEDENT TO HABEAS APPLICATIONS CREATES NO INCONSISTENCY WITH THE HABEAS FRAMEWORK GENERALLY OR WITH AEDPA IN PARTICULAR 16

A. Consistency With The General Habeas Framework 16

B. Consistency Of Rule 15(c) With AEDPA 18

TABLE OF CONTENTS—Continued

Page

1. AEDPA's statute of limitations 18
2. AEDPA's changes to other procedures 22

IV. APPLYING FEDERAL RULE OF CIVIL PROCEDURE 15(C) WILL PRESERVE MERITORIOUS CLAIMS WITHOUT MEANINGFULLY IMPACTING THE STATES' NOTICE OR FINALITY INTERESTS 23

A. The States' Notice And Finality Interests Are Protected By At Least Three Other Systemic Safeguards, Important Elements Of Which Were Strengthened By AEDPA 24

1. District courts are empowered to reject inadequate petitions 24
2. A final decision normally cuts off further amendments 25
3. Congress specifically strengthened the two prior protections with regard to the only petitioners who have some motivation to drag out their litigation 26

B. Rule 15(c)'s Relation-Back Rule Is Critical For Preserving Meritorious Claims, Particularly In Light Of The Structure Of The Attorney-Appointment Process In Federal Habeas 27

CONCLUSION 28

TABLE OF AUTHORITIES

CASES

Page(s)

Artuz v. *Bennett*, 531 U.S. 4 (2000) 20
Baldwin County Welcome Center v. *Brown*, 466 U.S. 147 (1984) 6
Board of Regents v. *Tomanio*, 446 U.S. 478 (1980) 19
Browder v. *Director, Department of Corrections of Illinois*, 434 U.S. 257 (1978) 5
Brown v. *Allen*, 344 U.S. 443 (1953) 16
Buie v. *Woolway*, No. 98-C-2254, 2000 WL 528645 (N.D. Ill. Mar. 27, 2000) 7
Calderon v. *Ashmus*, 523 U.S. 740 (1998) 13
Cannon v. *University of Chicago*, 441 U.S. 677 (1979) 13
Carey v. *Saffold*, 536 U.S. 214 (2002) 10, 11, 26
Coleman v. *Thompson*, 501 U.S. 722 (1991) 10
Dorsey v. *Gill*, 148 F.2d 857 (D.C. Cir. 1945) 12
Duncan v. *Henry*, 513 U.S. 364 (1995) 9
Duncan v. *Walker*, 533 U.S. 167 (2001) 20
Ellzey v. *United States*, 324 F.3d 521 (7th Cir. 2003) 8, 15, 25
Engle v. *Isaac*, 456 U.S. 107 (1982) 16
FDIC v. *Bennett*, 898 F.2d 477 (5th Cir. 1990) 5
FDIC v. *Grant*, 8 F. Supp. 2d 1275 (N.D. Okla. 1998) 5
FDIC v. *Knostman*, 966 F.2d 1133 (7th Cir. 1992) 7, 9
Felix v. *Mayle*, 379 F.3d 612 (9th Cir. 2004) 25
Felker v. *Turpin*, 518 U.S. 651 (1996) 23
Foman v. *Davis*, 371 U.S. 178 (1962) 25
Grace v. *Rosenstock*, 228 F.3d 40 (2d Cir. 2000) 25
Grattan v. *Burnett*, 710 F.2d 160 (4th Cir. 1983), *aff'd*, 468 U.S. 42 (1984) 7, 8, 9
Harris v. *Nelson*, 394 U.S. 286 (1969) 12
Hensley v. *Municipal Court*, 411 U.S. 345 (1973) 17
Holiday v. *Johnston*, 313 U.S. 342 (1941) 12, 17
Irwin v. *Department of Veterans Affairs*, 498 U.S. 89 (1990) 19

TABLE OF AUTHORITIES—Continued

Page(s)

Jones v. *United States*, 304 F.3d 1035 (11th Cir. 2002) 25
Kiser v. *Johnson*, 163 F.3d 326 (5th Cir. 1999) 13
Lindh v. *Murphy*, 521 U.S. 320 (1997) 15
Littlejohn v. *Artuz*, 271 F.3d 360 (2d Cir. 2001) 15
Lonchar v. *Thomas*, 517 U.S. 314 (1996) 17
McCleskey v. *Zant*, 499 U.S. 467 (1991) 16
McFarland v. *Scott*, 512 U.S. 849 (1994) 17, 28
Miller v. *American Heavy Lift Shipping*, 231 F.3d 242 (6th Cir. 2000) 7
Moore v. *New York Cotton Exchange*, 270 U.S. 593 (1926) 6
Moore v. *Schoeman*, 288 F.3d 1231 (10th Cir. 2002) 21
Morton v. *Mancari*, 417 U.S. 535 (1974) 23
Nevius v. *McDaniel*, 104 F.3d 1120 (9th Cir. 1997) 21
Newell v. *Hanks*, 283 F.3d 827 (7th Cir. 2002) 13
Rose v. *Lundy*, 455 U.S. 509 (1982) 17, 20, 21
Slack v. *McDaniel*, 529 U.S. 473 (2000) 18
Specht v. *Netscape Communications Corp.*, 306 F.3d 17 (2d Cir. 2002) 10
Tiller v. *Atlantic Coast Line Railroad Co.*, 323 U.S. 574 (1945) 6, 7, 9, 11
USX Corp. v. *Barnhart*, 395 F.3d 161 (3d Cir. 2004) 5
United States v. *Kubrick*, 444 U.S. 111 (1979) 18
United States v. *Winestock*, 340 F.3d 200 (4th Cir. 2003) 21
Waley v. *Johnston*, 316 U.S. 101 (1942) 16
Warren v. *Garvin*, 219 F.3d 111 (2d Cir. 2000) 25
Wilwordin v. *Swenson*, 502 F.2d 844 (8th Cir. 1974) 27
Withrow v. *Williams*, 507 U.S. 680 (1993) 12
Woodford v. *Garceau*, 538 U.S. 202 (2003) 13
Zagurski v. *American Tobacco Co.*, 44 F.R.D. 440 (D. Conn. 1967) 7

TABLE OF AUTHORITIES—Continued

Page(s)

STATUTES AND RULES

21 U.S.C. § 848 23
28 U.S.C. § 2241 9
28 U.S.C. § 2242 ..... 3, 11, 12, 13, 28
28 U.S.C. § 2244 ..... *passim*
28 U.S.C. § 2254 ..... 9, 16, 21, 22
28 U.S.C. §§ 2261-2266 13
28 U.S.C. § 2263 13
28 U.S.C. § 2266 ..... 13, 14, 26
28 U.S.C. § 2553 23
Act of Feb. 5, 1867, ch. 28, 14 Stat. 385 16
Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 100 Stat. 1214 4
Federal Rule of Appellate Procedure
Rule 22 22
Federal Rule of Civil Procedure
Rule 15 ..... *passim*
Rule 81 11
Rules Governing § 2254 Cases
Rule 2 ..... 16, 17
Rule 9 19
Rule 11 ..... 3, 4, 11

LEGISLATIVE MATERIALS

142 Cong. Rec. S7657 (daily ed. June 5, 1995) 22
142 Cong. Rec. H2143 (daily ed. Mar. 13, 1996) 22
142 Cong. Rec. H2184 (daily ed. Mar. 13, 1996) 22
142 Cong. Rec. H2259 (daily ed. Mar. 14, 1996) 22
142 Cong. Rec. S3369 (daily ed. Apr. 16, 1996) 14
142 Cong Rec. H3609 (daily ed. Apr. 19, 1996) 14

TABLE OF AUTHORITIES—Continued

Page(s)

OTHER AUTHORITIES

Black's Law Dictionary (3d ed. 1933) 6, 8
Hertz, Randy & James S. Liebman, *Federal Habeas Corpus Practice and Procedure* (4th ed. 2001 & Supp. 2004) 10, 19, 21, 24, 27
United States Department of Justice, Bureau of Justice Statistics, *Federal Habeas Corpus Review: Challenging State Court Criminal Convictions* (1995) 14, 27
Wright, Charles Alan, et al., *Federal Practice and Procedure* (3d ed. 2004) 19
Wright, Charles Alan, *Procedure for Habeas Corpus*, 77 F.R.D. 237 (1978) 12
Yackle, Larry W., *Federal Courts: Habeas Corpus* (2003) 16

IN THE

Supreme Court of the United States

No. 04-563

DENEICE A. MAYLE, WARDEN,
Petitioner,

v.

JACOBY LEE FELIX,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICI CURIAE* HABEAS LAW SCHOLARS ALBERT ALSCHULER, JOHN H. BLUME, ERWIN CHEMERINSKY, ERIC M. FREEDMAN, RANDY HERTZ, JAMES S. LIEBMAN, AND IRA P. ROBBINS IN SUPPORT OF RESPONDENT

INTEREST OF *AMICI*[1]

Amici are professors of law with a particular interest in the rules governing federal courts' resolution of state prisoners' applications for writs of habeas corpus.

Albert Alschuler is the Julius Kreeger Professor of Law and Criminology at The University of Chicago Law School. He teaches courses, several of which address habeas issues, on federal criminal law, constitutional law, and crimi-

[1] Pursuant to Rule 37.6, *amici curiae* certify that no counsel for a party authored this brief in whole or in part, and that no person or entity, other than *amici* or their counsel, has made a monetary contribution to the preparation or submission of this brief. Letters from the parties consenting to the filing of this brief are on file with the Clerk.

nal procedure. Professor Alschuler has published extensively in the area of criminal justice.

John H. Blume is an Associate Professor of Law at Cornell Law School, where he teaches evidence, criminal procedure, and post-conviction remedies and directs the Cornell Death Penalty Project. He also serves as Habeas Assistance and Training Project Counsel, which provides training programs and resource materials to attorneys appointed under the Criminal Justice Act in federal habeas corpus proceedings and serves as consultant to the Defender Services Committee of the Administrative Office of the United States Courts. He is a co-author of the *Federal Habeas Corpus Update*, an annual survey of federal habeas corpus developments.

Erwin Chemerinsky is the Alston & Bird Professor of Law at the Duke University Law School. He is the author of several treatises, including *Federal Jurisdiction* (Aspen Law & Business, 4th ed. 2003), and numerous additional publications, including *Innocence and Habeas Corpus*, 31 Trial 79 (Apr. 1995), and *Thinking About Habeas Corpus*, 37 Case W. Res. L. Rev. 748 (1987).

Eric M. Freedman is the Maurice A. Deane Distinguished Professor of Constitutional Law at Hofstra University. He has published numerous scholarly works concerning habeas corpus and civil procedure, including *Habeas Corpus: Rethinking the Great Writ of Liberty* (2002).

Randy Hertz is a professor of clinical law and director of the clinical and advocacy program at the New York University School of Law. He is co-author, along with Professor James S. Liebman, of *Federal Habeas Corpus Practice and Procedure* (4th ed. 2001 and annual supplements, as well as earlier editions), and Brecht v. Abrahamson: *Harmful Error in Habeas Corpus Law*, 84 J. Crim. L. & Criminology 1109 (1994).

James S. Liebman is the Columbia University School of Law Simon H. Rifkind Professor of Law. He is co-author of several books, including, with Professor Randy Hertz, *Federal Habeas Corpus Practice and Procedure* (4th ed. 2001

and annual supplements, as well as earlier editions); *A Broken System: Error Rates in Capital Cases, 1973–1995* (2000), *A Broken System, Part II: Why There Is So Much Error in Capital Cases and What Can Be Done About It* (2002); *A Modern Approach to Evidence* (3d. ed.). His numerous published articles include *A Rough Outline of the New Habeas and the New Section 2255*, and *The New Habeas: The Standard for Adjudicating Legal Questions*, ALI-ABA Video L. Rev. (1996).

Ira P. Robbins is the Barnard T. Welsh Scholar and Professor of Law and Justice at American University's Washington College of Law and specializes in criminal law, habeas corpus, and correctional law. He teaches seminars on habeas corpus and death penalty litigation and is the author of *Habeas Corpus Checklists* (annual editions, 1993-2005); *Prisoners in the Law* (six vols., 2004); *The Law and Processes of Post-Conviction Remedies: Cases and Materials* (1982), and many other books and articles on post-conviction remedies.

SUMMARY OF ARGUMENT

The Federal Rules of Civil Procedure apply to habeas proceedings unless a habeas-specific statute or rule provides an alternate procedure. *See, e.g.*, Rules Governing § 2254 Cases Rule 11 (Habeas Rules) ("The Federal Rules of Civil Procedure, to the extent that they are not inconsistent with any statutory provision or these rules, may be applied to a proceeding under these rules."). As applied to amendments of habeas corpus applications, this general rule has long been confirmed by 28 U.S.C. § 2242, which specifically provides that an "[a]pplication for a writ of habeas corpus may be . . . amended or supplemented as provided in the rules of procedure available to civil actions." Federal Rule of Civil Procedure 15 is the applicable rule of procedure "available to civil actions," and Rule 15(c) provides the rule governing whether an amendment relates back to the time the application was filed for purposes of the statute of limitations. Rule 15(c) mandates that an amendment to a habeas petition relates back to the date of the original application so long as "the

claim . . . asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading." Fed. R. Civ. P. 15(c)(2). Under the ordinary application of that standard, an amended habeas application attacking the same judgment of conviction or sentence as the original application relates back because the judgment imposing custody is the relevant "transaction" for habeas corpus purposes.

For three reasons, ordinary application of Rule 15(c) would in no respect interfere with the operation of the statute of limitations on habeas applications such that it is "inconsistent" with any federal statutory provision or Habeas Rules. First, this case is governed not by the generalized language of Habeas Rule 11, but by § 2242's specific statutory directive that "the rules of procedure available to civil actions" apply to the amendment of habeas petitions. Only a direct conflict with another statute could create a sufficient "inconsistency" to overcome this statutory command, and there is no such conflict. Second, the straightforward application of Rule 15(c) to habeas actions is not inconsistent with the habeas framework generally or with the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, in particular. AEDPA does not promote the finality of criminal convictions to the exclusion of any other objective. Rather, Congress's purpose in enacting AEDPA was to streamline habeas litigation in a way that is both consistent with, and facilitated by, application of Rule 15(c)'s relation-back rules. Finally, Rule 15(c)'s relation-back analysis is desirable because it preserves meritorious claims for review without undermining the capacity of other civil and habeas rules to guard against potential abuse of the Great Writ.

ARGUMENT

I. AN AMENDED HABEAS APPLICATION ATTACKING THE SAME JUDGMENT OF CONVICTION OR SENTENCE AS THE ORIGINAL APPLICATION RELATES BACK UNDER FEDERAL RULE OF CIVIL PROCEDURE 15(C) BECAUSE THE JUDGMENT IS THE RELEVANT "TRANSACTION"

The resolution of this case turns on whether the relation-back principles established in Federal Rule of Civil Procedure 15(c) apply in the habeas corpus context as they do in any other civil case. *See, e.g., Browder* v. *Director, Dep't of Corrections of Ill.*, 434 U.S. 257, 269 (1978) ("It is well settled that habeas corpus is a civil proceeding.") (citations omitted). To illustrate the consistency between Rule 15(c) and the statutes and rules governing habeas proceedings, it is first necessary to describe the operation of Rule 15(c) and its application to this case.

A. Plain Language Of Rule 15

Rule 15(c) governs how amendments shall be treated for statute of limitations purposes. It provides: "An amendment of a pleading relates back to the date of the original pleading when . . . the claim . . . asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading." Fed. R. Civ. P. 15(c)(2). Rule 15(c) is phrased in the disjunctive. An amended pleading relates back when the claim asserted in the amended pleading arises out of the same "conduct" or "transaction" or "occurrence" as the original pleading. Thus, an amended pleading asserting claims arising out of the same transaction or occurrence or conduct as the original pleading therefore relates back for statute of limitations purposes, even if the other constituent terms of 15(c) are not satisfied. *See USX Corp.* v. *Barnhart*, 395 F.3d 161, 167 (3d Cir. 2004); *FDIC* v. *Bennett*, 898 F.2d 477, 479 (5th Cir. 1990); *FDIC* v. *Grant*, 8 F. Supp. 2d 1275, 1290 (N.D. Okla. 1998).

At the time Rule 15(c) was promulgated in 1938, the term "transaction" was defined broadly to include, for example, an extended series of events involving multiple ac-

tors: "[P]roperly embrac[ing] that combination of acts and events, whether in nature of contract or tort, out of which a legal right springs, or upon which a legal obligation is predicated[,] [t]ransaction includes all the facts and circumstances out of which the injury arose, or the entire series of acts and conduct of the parties in the business or proceeding between them which forms the basis of their agreement." *Black's Law Dictionary* 1747 (3d ed. 1933) (citations omitted). As this Court has long recognized, "transaction" is "a word of flexible meaning . . . [that] may comprehend a series of many occurrences, depending not so much upon the immediateness of their connection as upon their logical relationship." *Moore* v. *New York Cotton Exch.*, 270 U.S. 593, 610 (1926).

B. Policies Underlying Rule 15(c)

Rule 15's focus on "conduct, transaction, or occurrence" balances the interests of ensuring notice to the answering party, while at the same time allowing meritorious claims to go forward. It is predicated on the concept that "a party who has been notified of litigation concerning a particular occurrence has been given all the notice that statutes of limitation were intended to provide." *Baldwin County Welcome Ctr.* v. *Brown*, 466 U.S. 147, 149 n.3 (1984).

This Court's analysis of relation-back issues has emphasized that the concept of notice is central to application of Rule 15(c). In *Tiller* v. *Atlantic Coast Line Railroad Co.*, 323 U.S. 574 (1945), the plaintiff alleged that her husband's death in a railroad accident was caused by a negligent failure to keep a lookout, to give proper warning, to keep the head car properly lighted, or to inform her husband of a change in the manner of shifting cars, in violation of the Federal Employers' Liability Act. The plaintiff subsequently amended her complaint to allege that her husband's death had been caused by different conduct (a negligent failure to light the rear locomotive), and in violation of a different legal authority (the Federal Boiler Inspection Act and related regulations). This Court held that the amended complaint related back, reasoning that both claims "related to the same general conduct, transaction and occurrence which involved the

death of the deceased." *Id.* at 581. "There was therefore no departure," the Court held, since "[t]he cause of action now, as it was in the beginning, is the same—it is a suit to recover damages for the alleged wrongful death of the deceased." *Id.* Accordingly, concluded the Court, "[t]here is no reason to apply a statute of limitations when, as here, the respondent has had notice from the beginning that petitioner was trying to enforce a claim against it because of the events leading up to the death of the deceased in the respondent's yard." *Id.*

Following *Tiller*, federal courts have held that amendments asserting additional claims—even if they involve new legal theories and significant variation in factual proof—relate back to the earlier pleading so long as they challenge the same core transaction or occurrence causing the injury for which the plaintiff's original complaint sought relief. *See, e.g.*, *Miller* v. *American Heavy Lift Shipping*, 231 F.3d 242, 248-249 (6th Cir. 2000) ("An amendment that alleges added events leading up to the same injury relates back.") (internal quotation marks omitted); *FDIC* v. *Knostman*, 966 F.2d 1133, 1139 (7th Cir. 1992) (holding that an amended complaint related back to the pending, original complaint where "the basis of plaintiffs' claims in both the original complaint and [amended] Count ... involved the [same] Contracts," such that the defendant "should have been prepared to defend the action against all claims which could have arisen pursuant to the two contracts"); *Grattan* v. *Burnett*, 710 F.2d 160, 163 (4th Cir. 1983) (holding that the added claim in the amended complaint at issue related back because "[b]oth [pleadings] concern the events leading up to the[] termination ... and in both the termination was the ultimate wrong of which they complained"), *aff'd*, 468 U.S. 42 (1984); *Buie* v. *Woolway*, No. 98-C-2254, 2000 WL 528645 (N.D. Ill. Mar. 27, 2000); *Zagurski* v. *American Tobacco Co.*, 44 F.R.D. 440, 443 (D. Conn. 1967). In such circumstances, the original pleading has placed the defendant on notice sufficient to warrant treating the amendment as if it were filed at the time of the original pleading.

C. Rule 15(c)'s Standard As Applied To Amended Habeas Applications

When applied in the habeas context as it is in other civil contexts, Rule 15(c) as interpreted in *Tiller* dictates that an amended application for a writ of habeas corpus relates back to a timely, pending application as long as the amendment attacks the same judgment of conviction or sentence as the original filing.

Under the plain text of Rule 15(c), the judgment that results in a prisoner's incarceration is the source of the injury he alleges and thus is the "transaction" to which any amendment must relate back. A "transaction" is the "combination of acts and events . . . upon which a legal obligation is predicated." *Black's Law Dictionary* 1747 (3d ed. 1933); *see also id.* ("Transaction includes all the facts and circumstances out of which the injury arose."). Here, the state court judgment imposing custody is the "legal obligation" and source of injury. The state court judgment encompasses, and is, the culmination of the "combination of acts and events"—the legal proceedings—that lead to it. Because the judgment imposing custody is "the ultimate wrong of which" the prisoner complains, *Grattan*, 710 F.2d at 163; *accord Ellzey* v. *United States*, 324 F.3d 521, 526 (7th Cir. 2003), any challenge to the validity of that same judgment of conviction or sentence relates to that "transaction."

This application to Respondent of Rule 15(c)'s relation-back principles in this case is consistent with the policy of the Rule to facilitate the resolution of claims on their merits, because it is crucial to Mr. Felix's capacity to vindicate his constitutional claim that the admission of his statement, allegedly obtained through coercion, violated his Fifth Amendment right against self-incrimination. This application also advances the Rule's "fair notice" policy, and as a result, fits comfortably within *Tiller* and later cases adopting its analytic approach. In granting relation back, the Court in *Tiller* emphasized that "[t]here is no reason to apply a statute of limitations when, as here, the respondent has had notice from the beginning that petitioner was trying to

enforce a claim against it because of the events leading up to the [ultimate injury]." 323 U.S. at 581; *accord, e.g., Knostman*, 966 F.2d at 1139 (relation back appropriate because the defendant "should have been prepared to defend the action against all claims which could have arisen pursuant to the two contracts"); *Grattan*, 710 F.2d at 163 ("Both [pleadings] concern the events leading up to their termination . . . and in both the termination was they complained."). The same is true of an amended habeas application that attacks the same judgment of conviction or sentence as the original, pending application. The State in such a case has been on notice, since the timely filing of the initial application, of the claim that the state court judgment that placed the prisoner in custody, and thus was the source of his alleged injury, is "in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2241; *see also Tiller*, 323 U.S. at 581.

In light of habeas-specific doctrines like the exhaustion of state remedies and procedural default rules, notice is further provided in habeas proceedings because claims presented in a federal habeas application have already been litigated against essentially the same adverse party at the state level. The exhaustion requirement mandates dismissal of habeas claims by prisoners that have not been "fairly present[ed] . . . to the state courts in order to give the State the opportunity to pass upon and correct the alleged violation of its prisoners' federal rights." *Duncan* v. *Henry*, 513 U.S. 364, 365-366 (1995).[2] Moreover, "a habeas petitioner who has

---

[2] Specifically as codified by AEDPA, "[a]n application for a writ of habeas corpus on behalf of a person shall not be granted unless it appears that (A) the applicant has exhausted the remedies available in the courts of the State; or (B) there is an absence of available State corrective processes[,] or circumstances exist that render such process ineffective to protect the rights of the applicant." 28 U.S.C. § 2254(b)(1). Two narrow, non-statutory exceptions have also been recognized in cases in which (1) failure to exhaust is not discovered until after a full hearing or other proceedings and the district court concludes that dismissal would be wasteful of judicial resources; and (2) district courts conclude that dismissal would

failed to meet the State's procedural requirements for presenting his federal claims" is generally procedurally barred from raising the claim at the federal level. *Coleman* v. *Thompson*, 501 U.S. 722, 731 (1991). Thus—absent waiver of these protective doctrines by the State, which is of course entirely within the State's control—the State will usually have already actually litigated the claim at issue in any amended application. In such situations, the State has both actual and inquiry notice of the claim. *See, e.g., Specht* v. *Netscape Communications Corp.*, 306 F.3d 17, 30 (2d Cir. 2002) ("Inquiry notice is actual notice of circumstances sufficient to put a prudent man upon inquiry").

As Petitioner's amicus acknowledges, therefore, "[h]abeas procedure makes it highly likely that the state will also have actual notice of any specific claim that the petitioner may be able to raise in an amended petition." Criminal Justice Legal Foundation Br. 20. Indeed, in this case, the State has been on notice of the Respondent's challenge to admission of his involuntary statements since the initial trial in 1995.[3] In amended habeas applications, "[t]here is no

---

"serve no interest state or federal, would burden the states with unnecessary litigation, or would constitute a hollow exercise in etiquette." *See* 1 Randy Hertz & James S. Liebman, *Federal Habeas Corpus Practice and Procedure* § 234b nn.31-32 and accompanying text (4th ed. 2001 & Supp. 2004) (internal quotation marks and citations omitted).

[3] *See People* v. *Felix*, No. 93-CF-F09225, *Notice of Motion, Motion for Order Suppressing Statements of Defendant, & Memorandum of Points and Authorities in Support of Motion to Suppress Statements of the Defendant*, CT 581, 583, 589 (May 26, 1995) (moving, with regard to "the videotaped recording of the interview in question," that "the Court[] suppress the entire statement by the Defendant"). Here, California did not receive the additional advance notice of the amendment that would be available in "most states" where a petitioner is required to "file[] a [state habeas] petition in a state court of first instance, typically in trial court" *Carey* v. *Saffold*, 536 U.S. 214, 219 (2002), before filing in federal court. The reason, however, is California's own idiosyncratic rule allowing prisoners to file an original habeas petition in the California Supreme Court to exhaust their claims. Because States control their own procedures, "California remains free, through legislative or judicial action, to adjust its

reason to apply a statute of limitations when, as here, the respondent has had notice from the beginning that petitioner was trying to enforce a claim against it because of the events leading up to" the transaction or occurrence causing Respondent's ultimate injury—the judgment resulting in his incarceration. *Tiller*, 323 U.S. at 581.

For the foregoing reasons, applying relation-back rules in the habeas context as in other civil cases requires that an amended habeas application attacking the same judgment of conviction or sentence as the original application relates back under Federal Rule of Civil Procedure 15(c) because the judgment imposing custody is the relevant "transaction."

II. APPLICATION OF FEDERAL RULE OF CIVIL PROCEDURE 15(C) TO HABEAS CASES IS SPECIFICALLY MANDATED BY 28 U.S.C. § 2242 AND IS NOT INCONSISTENT WITH ANY PROVISION OF FEDERAL LAW

Habeas Rule 11 and Federal Rule of Civil Procedure 81(a)(2) both reflect Congress's generalized instruction that civil procedure rules apply to habeas cases unless overridden by some habeas-specific statute or rule. *See* Habeas Rule 11 ("The Federal Rules of Civil Procedure, to the extent that they are not inconsistent with any statutory provision or these rules, may be applied to a proceeding under these rules."); Fed. R. Civ. P. 81(a)(2) ("These rules are applicable to proceedings for ... habeas corpus ... to the extent that the practice in such proceedings is not set forth in statutes of the United States [or] the Rules Governing Section 2254 Cases, ... and has heretofore conformed to the practice in civil actions."). In this case, the habeas statutes and rules provide no *contrary* procedure for the simple reason that one of those statutes, 28 U.S.C. § 2242, expressly provides that an "[a]pplication for a writ of habeas corpus may be ... amended or supplemented as provided in the rules of procedure available to civil actions." Indeed, application of the

---

original writ system" to conform to the practice in virtually every other state. *Id.* at 225 (internal quotation marks omitted).

federal civil rules to motions to amend was the established practice of this and other federal courts in habeas cases even before § 2242 was enacted in the omnibus 1948 revision designed to conform the Judicial Code to existing practice. *See* 28 U.S.C. § 2242, Historical and Statutory Notes ("The third paragraph [subjecting habeas amendments to the civil rules of procedure] is new. It was added to conform to existing practice as approved by judicial decisions." (citing *Holiday* v. *Johnston*, 313 U.S. 342 (1941); *Dorsey* v. *Gill*, 148 F.2d 857, 865, 866 (D.C. Cir. 1945)).

Whatever may be the case, therefore, for civil rules of procedure not specifically addressed by the habeas statutes, the "rules of procedure available to civil actions" that describe how pleadings "may be ... amended" are explicitly incorporated into, and thus cannot be inconsistent with, the habeas statutes. On its face, § 2242 governs amendment issues in habeas, and it demonstrates that Congress intended Rule 15 to apply to habeas petitions. *See Withrow* v. *Williams*, 507 U.S. 680, 696 n.7 (1993) (noting in dicta that "Rule 15 applies in habeas actions"); Charles Alan Wright, *Procedure for Habeas Corpus*, 77 F.R.D. 237, 240 (1978) ("The Habeas Corpus Rules are silent on whether a petition may be amended. The statute, however, provides that a petition may be amended or supplemented as provided in the rules of procedure applicable to civil actions. Thus amendment of the petition will be allowed under the liberal standards of Civil Rule 15."); *see also Harris* v. *Nelson*, 394 U.S. 286, 298 (1969) (noting the "continuing applicability" of the Federal Rules of Civil Procedure to habeas procedural questions that had theretofore been resolved in accordance with pre-existing federal civil practice).

Nor is there any basis for concluding that the adoption of the Habeas Rules in 1977 was intended *sub silentio* to nullify § 2242. On the contrary, the original Advisory Committee Notes to the Habeas Rules expressly assumed that Rule 15 would continue to apply in habeas proceedings. *See* 1976 Advisory Committee Notes to Rule 15 ("[C]ivil rule 15(a) may be used to allow the petitioner to amend his petition

when the court feels this is called for by the contents of the answer"). The Habeas Rules themselves are silent on the issue of amendment, *see, e.g.*, *Newell* v. *Hanks*, 283 F.3d 827, 835 (7th Cir. 2002), just as one would expect where an existing statute—§ 2242—already occupies the field. *Cf. Woodford* v. *Garceau*, 538 U.S. 202, 208 (2003) ("Nothing in the Habeas Corpus Rules contradicts Rule 3. The logical conclusion, therefore, is that a habeas suit begins with the filing of an application for habeas corpus relief—the equivalent of a complaint in an ordinary civil case."); *Kiser* v. *Johnson*, 163 F.3d 326 (5th Cir. 1999) ("[W]here the Rules Governing Section 2254 Cases are silent on an issue, Rule 11 compels us to follow the Federal Rules of Civil Procedures.").

Nor does AEDPA purport to amend or repeal § 2242—save in one specific respect that does not apply to this non-capital case and proves that, when Congress meant to alter the operation of § 2242, it did so explicitly. AEDPA adopted a new chapter 154 of the Judicial Code, which was designed to address chronic delays in capital cases by providing states a series of additional procedural protections in habeas litigation in return for creating mechanisms to ensure the prompt appointment of state post-conviction counsel for capital prisoners. *See generally* 28 U.S.C. §§ 2261-2266; *Calderon* v. *Ashmus*, 523 U.S. 740, 742 (1998). For states that "opt in" by extending a right to counsel in state post-conviction proceedings, Congress cut the statute of limitations in half—to just 180 days, *see* 28 U.S.C. § 2263(a)—and explicitly provided that "[n]o amendment to an application for a writ of habeas ... shall be permitted after the filing of an answer to the application" unless such amendment meets the strict standards for a second or successive petition "specified in section 2244(b)." *Id.* § 2266(b)(3)(B).

This change is critically important for at least two reasons. First, even beyond the general presumption that Congress legislated against the background of existing statutes such as 28 U.S.C. § 2242, *see Cannon* v. *University of Chi.*, 441 U.S. 677, 696-697 (1979) ("It is always appropriate to assume that our elected representatives, like other citizens,

know the law."), § 2266(b)(3)(B) affirmatively demonstrates that Congress considered the specific relationship between the statutory time limits that it imposed in AEDPA and existing habeas amendment procedures. Chapter 154 embodies Congress's judgment that amendment rules should be tightened in capital cases, but, significantly, only where prisoners have been provided special additional protections to ensure that all of their constitutional claims are identified early in the post-conviction process. This judgment is particularly salient given Congress's focus on the death penalty in the AEDPA debates, *see, e.g.*, 142 Cong. Rec. S3369 (daily ed. Apr. 16, 1996) (statement of Sen. Inhofe); *id.* at H3609 (daily ed. Apr. 19, 1996) (statement of Rep. Buyer), and given the empirical evidence that delays in resolution in habeas proceedings are principally a concern in capital cases, *see, e.g.*, U.S. Department of Justice, Bureau of Justice Statistics, *Federal Habeas Corpus Review: Challenging State Court Criminal Convictions* 25 (1995) (noting that for habeas applications raising three or more issues, the mean processing time was 925 days for applications raising three or more issues, versus 344 days for a person sentenced to a term of years).

Second, the specific change that Congress made in Chapter 154—by mandating that post-answer amendments in opt-in capital cases be treated as successive or second petitions under 28 U.S.C. § 2244(b)[4]—confirms that Congress

[4] Section 2244(b) replaced various doctrines developed by this Court to restrict the filing of repetitive successive petitions with an even stricter set of procedural and substantive limitations. Thus, petitioners cannot bring claims not raised in their prior applications unless those claims (A) involve a new rule of constitutional law made retroactive to cases on collateral review by the Supreme Court, or (B) involve facts that could not have been discovered earlier through the exercise of due diligence *and* that would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the applicant guilty but for the constitutional error. 28 U.S.C. § 2244(b)(2). They must also seek leave to file from a court of appeals, and those determinations are not subject to rehearings or to Supreme Court certiorari review. *Id.* § 2244(b)(3).

did not otherwise intend that initial habeas petitions be rigidly fixed as initially filed, such that any amendment must be treated as a separate, stand alone collateral attack. The only understanding of the background legal rules that makes sense of § 2266(b)(3)(B)'s inducement to opting-in states in capital cases is that amendments are otherwise permissible in habeas proceedings as long as they have a proper relation to the *initial* habeas application. That understanding is precisely consistent with § 2242's allowance of amendments and its adoption of the Federal Rules of Civil Procedure—including Rule 15(c)'s relation-back doctrine—to regulate their operation. *See Ellzey*, 324 F.3d at 526 ("An amendment that is not treated as a new challenge when counting multiple collateral attacks also is not a new challenge that must independently satisfy the statute of limitations."); *see also Littlejohn* v. *Artuz*, 271 F.3d 360, 363 (2d Cir. 2001) ("Given that motions to amend are not successive petitions, the standard for granting or denying a motion to amend is thus governed by Federal Rule of Civil Procedure 15(a)."). [5] Because Congress did not alter the habeas statue's pre-existing amendment rules outside of opt-in capital cases, AEDPA should not be construed to have undertaken any such alteration *sub silentio*. *Accord Lindh* v. *Murphy*, 521 U.S. 320, 329 (1997) ("Nothing, indeed, but a different intent explains the different treatment. Congress was explicit about Chapter 154 applying and could have been so about Ch. 153"); *id.* at 337-338 (Rehnquist, J., dissenting) (noting that the Court "relie[d] on . . . *expressio unius est exclusio alterius* [for] the negative inference that can be drawn from the fact that Congress expressly made chapter 154, pertaining to capital cases, applicable to pending cases, but did not make the same express provision in regards to chapter 153.").

[5] This understanding is reinforced by the absence of any reference in AEDPA's legislative history or the influential Powell Commission indicating a concern with relation-back rules.

III. Applying Federal Rule Of Civil Procedure 15(c) In Accordance With This Court's Precedent To Habeas Applications Creates No Inconsistency With The Habeas Framework Generally Or With AEDPA In Particular

Section 2242's clear command makes resort to general policy considerations unnecessary for the present inquiry. Even if the Court were to consider such policies, however, relation back when the amended application attacks the same judgment as the original application creates no inconsistency with the habeas framework generally or with AEDPA in particular.

A. Consistency With The General Habeas Framework

Since our nation's inception, the "Great Writ" has served both societal and prisoners' interests by providing "a bulwark against convictions that violate fundamental fairness." *Engle* v. *Isaac*, 456 U.S. 107, 126 (1982) (internal quotation marks and citation omitted); *see also McCleskey* v. *Zant*, 499 U.S. 467, 496 (1991) ("The writ of habeas corpus is one of the centerpieces of our liberties."); *Brown* v. *Allen*, 344 U.S. 443, 512 (1953) (describing the availability of the writ as "one of the decisively differentiating factors between our democracy and totalitarian governments"). In accordance with this critical function, Congress in 1867 made the writ available in "all cases where any person may be restrained of his or his liberty in violation of the constitution, or of any treaty or law of the United States." Act of Feb. 5, 1867, ch. 28, 14 Stat. 385, 385. Thereafter, Congress and the courts expanded the writ into "a general means by which federal courts could inquire into the validity of state court judgments." Larry W. Yackle, *Federal Courts: Habeas Corpus* 35 (2003); *see also* 28 U.S.C. § 2254; *Waley* v. *Johnston*, 316 U.S. 101 (1942).

Though habeas practice has not adopted notice pleading, *see* Habeas Rule 2, this Court has long recognized that because of the fundamental importance of the writ, habeas corpus is "not a static, narrow, formalistic remedy, but one which must retain the ability to cut through barriers of form

and procedural mazes." *Hensley* v. *Municipal Court*, 411 U.S. 345, 349 (1973); *Holiday* v. *Johnston*, 313 U.S. 342, 350 (1941) ("A petition for habeas corpus ought not to be scrutinized with technical nicety. Even if it is insufficient in substance it may be amended in the interest of justice.").[6]

Even when this Court has enforced strict procedural requirements to accord state criminal judgments respect in our federalist system and to curtail abuses of the writ, it has balanced such concerns against the need to protect the integrity of the writ in affording prisoners an effective and comprehensive opportunity to obtain review of their federal claims. *See, e.g., Lonchar* v. *Thomas*, 517 U.S. 314, 330 (1996) (rejecting the dismissal of petitions for ad hoc "equitable" reasons because "the interest in permitting federal habeas review of a first petition is quite strong"); *McFarland* v. *Scott*, 512 U.S. 849, 856 (1994) (holding that capital prisoners may obtain counsel prior to filing their initial habeas applications because "[r]equiring an indigent capital petitioner to proceed without counsel to obtain counsel would expose him to substantial risk that his habeas claims never would be heard on the merits"); *Rose* v. *Lundy*, 455 U.S. 509, 520 (1982) (praising exhaustion requirements because they "reduce[] piecemeal litigation" and increase the likelihood that "district court[s] will review all of the prisoner's claims in a single proceeding, thus providing for a more focused and thorough review"). The balanced consid-

---

[6] Indeed, although Habeas Rule 2(e) used to provide that the clerk of the court could refuse to accept a prisoner's filing where a district court judge authorized that the application be returned for failure to meet Habeas Rule 2 or 3 requirements, that provision was recently deleted in an effort to ensure that technical defects did not prevent prisoners from obtaining a review on the merits of their claims. *See* Habeas Rule 2 (as amended Dec. 1, 2004). The 2004 Advisory Committee Notes explain that the return rule had imposed no penalty on prisoners other than delay prior to the enactment of AEDPA's statute of limitations, but that in light of the new time limit, "the better procedure [is] to accept the defective petition and require the petitioner to submit a corrected petition that conforms to Rule 2(c)."

erations reflected in those decisions—promotion of decisions on the merits rather than on technicalities and discouragement of piecemeal litigation by promoting a first, full hearing of all petitioners' federal claims—continue to carry significant weight in post-AEDPA habeas practice. *See, e.g., Slack* v. *McDaniel*, 529 U.S. 473 (2000).

B. Consistency Of Rule 15(c) With AEDPA

AEDPA imposed a specific statute of limitations on habeas cases for the first time in the history of the writ and made various other significant changes to habeas corpus practice to streamline the decision-making process and promote the finality of state criminal law decisions. However, AEDPA's structure and legislative history demonstrate that the statute's focus was not finality to the exclusion of other congressional objectives. Rather, AEDPA reflected a balancing of competing objectives—in particular, ensuring access to a single, comprehensive round of federal review—that are consistent with, and facilitated by, Rule 15(c)'s relation-back rule.

1. AEDPA's statute of limitations

Petitioner and its *amici*'s central argument is that AEDPA's inclusion in 28 U.S.C. § 2244(d) of a one-year statute of limitations shows that Congress implicitly proscribed the normal operation of Rule 15(c) relation-back rules to habeas applications. A careful analysis of the history of statute of limitations in the habeas context, along with an examination of § 2244(d)'s text and purpose demonstrate that Congress did not intend to alter application of Rule 15(c) to habeas pleading amendments.

As a preliminary matter, it is important to note that nearly all civil causes of action are subjected to statutes of limitation to encourage the "reasonably diligent presentation" of claims, *United States* v. *Kubrick*, 444 U.S. 111, 123 (1979), by demarcating the legislature's judgment of the "point at which the delay of a plaintiff in asserting a claim is sufficiently likely either to impair the accuracy of the fact-finding process or to upset settled expectations that a substantive claim will be barred without respect to which it is meritorious." *Board of Regents* v. *Tomanio*, 446 U.S. 478, 487 (1980). Despite the beneficial functions of such time limits, legislatures frequently include statutory tolling provisions to avoid unnecessarily harsh application of limitations periods, and courts have developed additional doctrines to permit otherwise untimely claims to proceed when the opposing party has received fair notice of the dispute (as with the relation-back and waiver doctrines) or when the claimant can otherwise show good cause for delay (equitable tolling). *See, e.g., Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89 (1990) (holding that Title VII's statutory time limits are subject to equitable tolling against the United States).

In contrast to other types of civil complaints, however, habeas petitions were not historically subject to a specific time limit prior to AEDPA. Instead, Habeas Rule 9(a) merely imposed a laches-like standard that authorized, but did not require, dismissal of an unreasonably delayed claim if there was an additional showing that "the government has been prejudiced in its ability to respond to the petition by delay in its filing." Habeas Rule 9(a) (eff. 1977 to Dec. 1, 2004); *see also* § 2255 Rule 9(a) (eff. 1977 to Dec. 1, 2004).[7] AEDPA thus conformed habeas petitions to general civil practice by imposing a specific time limit on the filing of initial court actions. The relation-back rule of 15(c) is entirely compatible with statutes of limitation; indeed, its entire function is to harmonize, through its fair notice requirement, the goal of finality embodied in the statute of limitation with the objective of facilitating a full and fair merits adjudication of all claims attacking the same judgment and thus arising

[7] Prior to the implementation of Habeas Rule 9(a) in 1977, neither a statute of limitations nor laches principles were applied to habeas applications. Significantly, Congress struck language from the Rule that had been approved by the Supreme Court to create a rebuttible presumption of prejudice to the government if an application was filed more than five years after conviction. *See generally* 3 Charles Alan Wright et al., *Federal Practice and Procedure* § 597 (3d ed. 2004); 2 Hertz & Liebman, *supra* note 2, at ch. 24.

from the same "conduct, transaction, or occurrence." Fed. R. Civ. P. 15(c)(2).

Several features in the text of AEDPA's statute of limitations demonstrate that, as with its civil statute of limitation counterparts, § 2244(d)'s purpose was to promote multiple goals, including not just finality, but other policies such as comprehensive adjudication and equity. First, the statute does not simply provide that the limitations period shall run from the date on which the relevant state judgment becomes final, but provides three additional trigger dates for later-accruing challenges, and instructs that "[t]he limitation period shall run from the latest of the four" relevant possible dates. 28 U.S.C. § 2244(d)(1)(A)-(D).

Second, AEDPA provides that the clock shall be tolled while "a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending." 28 U.S.C. § 2244(d)(2). The provision "provides a powerful incentive for litigants to exhaust all available state remedies before proceeding in the lower federal courts," *Duncan* v. *Walker*, 533 U.S. 167, 180 (2001), thus minimizing the risk that federal review will even be required and helping to ensure that petitioners' applications can be promptly adjudicated if and when they are filed in federal court. *Cf. Rose*, 455 U.S. at 510 (requiring the dismissal of "mixed petitions" containing both exhausted and unexhausted claims to permit the petitioner to return to state court).

Third, Congress provided that the "1-year period of limitation shall apply to an *application* for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court," not to each individual *claim*. 28 U.S.C. § 2244(d)(1) (emphasis added); *cf. Artuz* v. *Bennett*, 531 U.S. 4, 9-10 (2000) (unanimously holding that the "only permissible interpretation" of § 2244(d)(2)'s tolling provision was to construe "application for State post-conviction or other collateral review" as referring to a petitioner's state filing as a whole, not to each claim individually).[8] A habeas

whole, not to each claim individually).[8] A habeas application is a request for relief from an allegedly unconstitutional or unlawful confinement imposed under a particular state court judgment. *See, e.g.*, 28 U.S.C. § 2254(a) ("[A]n application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court [shall be entertained] only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."). The statute of limitation's focus on the timeliness of the initial "application" thus parallels—and is entirely consistent with—Rule 15(c)'s focus not on each individual claim but on the underlying "transaction," namely, the state court judgment of conviction or sentence that has resulted in the challenged confinement and ultimately animates every claim in the habeas petitioner's application.

Such an approach makes sense, given that the filing of an initial timely application places the State on full notice that the validity of its underlying judgment is under challenge. Regardless of how many claims an application contains, the simple fact that it has been filed serves to extend the overall litigation and raise questions about the validity of the sentence under execution. Despite these effects, how-

---

[8] Construing the statute of limitations as applying to a petitioner's application as a whole based on the latest relevant trigger date is consistent with congressional intent, since it encourages petitioners to bring a single comprehensive application rather than filing separately each time a claim accrues. *See* 1 Hertz & Liebman, *supra* note 2, § 5.2b at 226-227 & n.70 ("Given Congress' objective of streamlining the habeas corpus process, it seems highly unlikely that Congress . . . opted for a claim-by-claim approach that could require piecemeal habeas corpus litigation on a scale never before imagined."); *see also Rose*, 455 U.S. at 520 (advocating the reduction of piecemeal litigation because single, comprehensive proceedings "provid[e] for a more focused and thorough review"). Such an interpretation is consistent with the distinction made between "applications" for habeas corpus and individual "claims" in other parts of the habeas statutes. *See, e.g., United States* v. *Winestock*, 340 F.3d 200 (4th Cir. 2003) (distinguishing between "claim" and "application" in 28 U.S.C. § 2244(b)(3)); *Nevius* v. *McDaniel*, 104 F.3d 1120 (9th Cir. 1997) (same); *see also Moore* v. *Schoeman*, 288 F.3d 1231 (10th Cir. 2002) (discussing the significance of "application" in 28 U.S.C. § 2254(b)(1)(A)).

ever, Congress nonetheless chose to preserve prisoners' initial access to the writ and to make their first review comprehensive, while sharply curtailing opportunities for filing successive or second petitions. *Accord, e.g.*, 142 Cong. Rec. H2259 (daily ed. Mar. 14, 1996) (remarks of Rep. McCollum) ("[W]e are going to provide for limited opportunity to go into Federal court after you have exhausted all of your regular appeals ... and provide in one bite at the apple[—t]he chance to raise all your procedural concerns over the case"); *id.* at S7657 (daily ed. June 5, 1995) (remarks of Sen. Dole); *id.* at H2143 (daily ed. Mar. 13, 1996) (remarks of Rep. McCollum); *id.* at H2184 (daily ed. Mar. 13, 1996) (remarks of Rep. Hyde).

Thus, the language, structure, and legislative history of AEDPA's statute of limitations demonstrate that Congress intended to bring habeas practice in line with the rules governing other civil actions by ensuring petitioners submit initial filings promptly so that states may have fair notice that the legality—and thus finality—of the underlying criminal judgment is in doubt. Applying the relation-back doctrine in accordance with *Tiller* provides an internally consistent and clear rule that furthers congressional intent by permitting petitioners a single opportunity to obtain comprehensive adjudication of all claims relating to the same "transaction" (judgment of sentence or conviction) challenged by the initial pleading.

2. AEDPA's changes to other procedures

AEDPA also altered a number of other existing procedural rules that Congress concluded were inadequate to ensure the timely resolution of claims. For example, the statute authorized district courts to dismiss unexhausted, meritless claims where the State expressly waives its exhaustion objection. 28 U.S.C. § 2254(b)(2)-(3). Further, it altered the procedure for filing successive habeas petitions to require that petitioners obtain circuit court approval and to bar rehearings or Supreme Court certiorari review of approval determinations. *See id.* § 2244(b)(3). In addition, it replaced Federal Rule of Appellate Procedure 22(b)'s procedure for

appealing adverse district court rulings to require petitioners to obtain certificates of appealability before proceeding. *See id.* § 2553(b). It also increased procedural requirements for obtaining leave to hire and for compensating court-funded investigators, expert witnesses, and other providers of support services, as well as capping fees for appointed counsel. *See* 21 U.S.C. § 848(q).

AEDPA's explicit alteration of all these procedural rules—enacting a new standard for amendment of petitions in opt-in states, imposing a statute of limitations, and tightening general habeas procedures—undercuts any argument that Congress implicitly altered amendment and relation-back principles with regard to non-capital prisoners and capital prisoners in states that decline to comply with Chapter 154 requirements. *Accord Morton* v. *Mancari*, 417 U.S. 535, 550 (1974) (construing an act of Congress to effect an implicit repeal is "disfavored unless there is "some affirmative showing of [congressional] intention"). As this Court has recognized, habeas rules and practices that were not altered by AEDPA remain intact. *See, e.g.*, *Felker* v. *Turpin*, 518 U.S. 651, 660 (1996) ("[W]e conclude that Title I of the Act has not repealed our authority to entertain original habeas petitions.").

IV. Applying Federal Rule Of Civil Procedure 15(c) Will Preserve Meritorious Claims Without Meaningfully Impacting The States' Notice Or Finality Interests

Petitioner and its *amici* assert that applying Rule 15(c) in accordance with this Court's precedents will create opportunities for abuse of the writ, as prisoners wait until the last possible moment to add additional claims that delay resolution of their cases by the courts. As detailed below, this theoretical "gaming" argument is foreclosed by two important realities of the current federal habeas system.

A. The States' Notice And Finality Interests Are Protected By At Least Three Other Systemic Safeguards, Important Elements Of Which Were Strengthened By AEDPA

Concerns about abusive amendments are largely confined to capital cases, because prisoners who are not under capital sentences have little or no motivation to drag out their cases by deliberately failing to raise meritorious claims when doing so would only postpone their prospects of relief. Furthermore, important protections available under Federal Rule of Civil Procedure 15(a) and caselaw concerning the propriety of amendments after a final court decision provide significant protections against abusive amendments. These protections have been further strengthened by enactments in AEDPA, including its special limitations in capital cases, which provide muscular protection against abuse of the writ without any need to read AEDPA as repealing § 2242's amendment provisions *sub silentio*.

1. District courts are empowered to reject inadequate petitions

States' notice and finality interests are protected in habeas proceedings by Federal Rule of Civil Procedure 15(a), which empowers district courts to play a gate-keeping function and reject inadequate petitions. Rule 15(a) authorizes courts to reject amendments to a state prisoner's habeas petition in a number of instances. First, it permits one amendment as a matter of course only until a responsive pleading is filed. Fed. R. Civ. P. 15(a). Thus, a State can simply file an answer, as the Warden did in the instant case after the amended petition was filed, to restrict the petitioner's subsequent amendment rights. Indeed, several circuit courts have rules requiring states to file answers unless a petition manifestly cannot be construed or revised to state a tenable claim for relief, and many states have adopted a practice of routinely answering petitions upon service, particularly in capital cases. 1 Hertz & Liebman, *supra* note 2, § 16.1, at 717.

Once an answer has been filed, Rule 15(a) requires petitioners to seek leave of court before amending their applications. Though Rule 15(a) provides that "leave shall be freely granted when justice so requires," this Court has long recognized that district courts have discretion to reject amendments due to bad faith or undue delay. *See, e.g.*, *Foman* v. *Davis*, 371 U.S. 178, 182 (1962) (denial of leave to amend under Rule 15(a) is proper where court finds "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc."); *Grace* v. *Rosenstock*, 228 F.3d 40 (2d Cir. 2000) (collecting cases and discussing district courts' discretion under Rule 15 (a)). In the habeas context, this discretion allows the denial of amendments that would be futile or, for reasons specific to the case, would frustrate the goals of AEDPA. *Ellzey*, 324 F.3d at 526; *Felix* v. *Mayle*, 379 F.3d 612, 616 & n.3 (9th Cir. 2004). The district court's power to police abuses provides more than sufficient incentive for prisoners petitioning for habeas relief to include all known, available claims and thereafter forego abusive amendments.

2. A final decision normally cuts off further amendments

Lower courts commonly apply Rule 15 to reject attempts to amend pleadings after a decision has been rendered. *See, e.g.*, *Ellzey*, 324 F.3d at 527 ("[R]ejection of a post-decision amendment almost never can be an abuse of discretion."); *Jones* v. *United States*, 304 F.3d 1035, 1043 & n.16 (11th Cir. 2002) (rejecting a relation-back argument concerning a § 2255 motion where the original motion had already been decided by the district and appellate courts); *Warren* v. *Garvin*, 219 F.3d 111, 114 (2d Cir. 2000) ("[T]he 'relation-back' doctrine is inapplicable when the initial habeas petition was dismissed, because there is no pleading to which to relate back."). As a result, district courts' ability to decide the underlying claims at any time further limits habeas petitioners' ability to amend their applications under

Rule 15(c) and increases their motivation to bring amendments as early as possible.

This motivation is particularly strong in light of AEDPA's strict limitations on prisoners' bringing successive or second petitions after their initial applications have been resolved. *See* 28 U.S.C. § 2244(b)(2) (prohibiting petitioners from bringing claims not raised in their prior applications unless those claims involve a narrow class of new rules of constitutional law made retroactive or involve a specified, quite narrow class of previously undiscovered facts). Any delay in asserting meritorious claims has become extremely risky because a decision by the district court will likely cut off any opportunity to seek review on the merits.

3. Congress specifically strengthened the two prior protections with regard to the only petitioners who have some motivation to drag out their litigation

Furthermore, it is significant that AEDPA *specifically* strengthened the protections provided by Rule 15 and dismissals in connection with capital prisoners—the only group of petitioners who have incentive to delay the resolution of their applications for relief pursuant to a writ of habeas corpus. Under the opt-in program specified in Chapter 154 of AEDPA, Congress provided both that petitioners may not amend their applications after a responsive pleading has been filed unless the new claim meets the narrow criteria for a successive petition, and required that district courts render a decision within 210 days after an application is filed. *See* 28 U.S.C. § 2266(b)(1), (b)(3)(B). As discussed *supra*, Congress's considered choice to enact stronger procedural rules to curtail amendments by certain capital petitioners implies a measured judgment by Congress that existing controls were otherwise adequate. To the extent that States experience ongoing abuse of the writ, AEDPA offers them the incentive and opportunity to conform their systems to opt in to the stronger protections afforded by Chapter 154. *Cf. Carey*, 536 U.S. at 223 ("[I]t is the State's interests that the tolling provision seeks to protect, and the State, through its supreme court decisions or legislation, can explicate timing requirements more precisely should that prove necessary.").

B. Rule 15(c)'s Relation-Back Rule Is Critical For Preserving Meritorious Claims, Particularly In Light Of The Structure Of The Attorney-Appointment Process In Federal Habeas

Limiting Rule 15(c)'s application in cases such as this is not only unnecessary for the reasons just summarized, but would also seriously affect those *pro se* prisoners who have vigilantly attempted to pursue their rights but may lack the knowledge of the facts and law needed to recognize and plead meritorious claims. The vast majority of habeas petitioners are unrepresented by counsel. *See Federal Habeas Corpus Review*, *supra*, at 14 ("In 93% of the sampled habeas corpus cases, the prisoner was without legal counsel (pro se)."). Most petitioners thus have no choice but to proceed as best they can. *See* 1 Hertz & Liebman, *supra* note 2, § 3.5b at 194-95; *id.* § 12.3. If *pro se* petitioners obtain counsel at all, the appointments do not occur unless and until a magistrate judge reviews the original application and determines that the application raises a claim or claims with sufficient merit to warrant appointment of an attorney. Thus, newly appointed counsel, in such situations of a potentially meritorious claim, often lack sufficient time before the expiration of AEDPA's one-year statute of limitations to analyze and amend the original application.

An unduly cramped construction of Rule 15(c) in such circumstances would threaten to bar a significant class of meritorious claims from reaching the courts for review. *Accord, e.g.*, *Wilwordin* v. *Swenson*, 502 F.2d 844, 847 n.4 (8th Cir. 1974) (courts "welcome" amendments clarifying *pro se* habeas petitions; amendments are preferred because they avoid successive petitions and indicate whether a hearing is necessary). As this Court has already recognized in holding that capital petitioners may apply for the appointment of counsel prior to filing their initial habeas petitions, assistance with framing an initial application is critical to ensur-

ing that "the first petition adequately set[s] forth all of a state prisoner's colorable grounds for relief." *McFarland* v. *Scott*, 512 U.S. 849, 860 (1994) (O'Connor, J., concurring in the judgment in relevant part), and avoiding "substantial risk that [petitioners'] habeas claims never would be heard on the merits." *Id.* at 856 (majority opinion). Ensuring that amendments will relate back to the initial application is critical for *pro se* petitioners to receive the benefits of representation in cases in which courts determine that attorney appointment is warranted.

In short, in addition to reflecting the plain language and policies of 28 U.S.C. §§ 2242 and 2244(d), the ordinary application of relation-back rules to habeas applications will preserve meritorious claims without meaningfully impacting the States' notice or finality interests.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

SETH P. WAXMAN
DAVID W. OGDEN
Counsel of Record
ALISON J. NATHAN
EDWARD N. SISKEL
KELLY THOMPSON COCHRAN
ARIEL B. WALDMAN
WILMER CUTLER PICKERING
HALE AND DORR LLP
2445 M Street, N.W.
Washington, DC 20037
(202) 663-6000

MARCH 2005

(4)

No. 04-563

FILED
FEB 2 2 2005
OFFICE OF THE CLERK

In The
Supreme Court of the United States

DENEICE A. MAYLE, Warden,

Petitioner,

v.

JACOBY LEE FELIX,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE STATES OF ARIZONA, ALASKA, ARKANSAS, COLORADO, DELAWARE, FLORIDA, HAWAII, IDAHO, ILLINOIS, IOWA, KANSAS, MARYLAND, MASSACHUSETTS, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEVADA, OHIO, OKLAHOMA, OREGON, PENNSYLVANIA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, VIRGINIA, WEST VIRGINIA, WASHINGTON, WISCONSIN, WYOMING, AND THE COMMONWEALTH OF PUERTO RICO AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

TERRY GODDARD
Attorney General of the
State of Arizona

MARY O'GRADY
State Solicitor General

RANDALL M. HOWE
Criminal Appeals Section Chief

MICHAEL O'TOOLE
Assistant Attorney General and
(*Counsel of Record*)
1275 W. Washington St.
Phoenix, AZ 85007
(602) 542-8593

Of Counsel:

DAN SCHWEITZER
750 First St., N.E.
Washington, D.C. 20002
(202) 326-6010

[Additional Counsel Listed On Inside Cover]

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

SCOTT J. NORDSTRAND
Acting Attorney General
of Alaska
P.O. Box 110300
Diamond Courthouse
Juneau, AK 99811-0300

MIKE BEEBE
Attorney General of Arkansas
200 Tower Building
323 Center Street
Little Rock, AR 72201-2610

JOHN W. SUTHERS
Attorney General of Colorado
1525 Sherman Street,
7th Floor
Denver, CO 80203

M. JANE BRADY
Attorney General of Delaware
DEPARTMENT OF JUSTICE
820 North French Street
Wilmington, DE 19801

CHARLES J. CRIST, JR.
Attorney General of Florida
The Capitol, PL 01
Tallahassee, FL 32399-1050

MARK J. BENNETT
Attorney General of Hawaii
425 Queen Street
Honolulu, HI 96813

LAWRENCE G. WASDEN
Attorney General of Idaho
P.O. Box 83720
Boise, ID 83720-1000

LISA MADIGAN
Attorney General of Illinois
James R. Thompson Center
100 West Randolph Street,
12th Floor
Chicago, IL 60601

THOMAS J. MILLER
Attorney General of Iowa
Hoover State Office Building
1305 East Walnut
Des Moines, IA 50319

PHILL KLINE
Attorney General of Kansas
120 S.W. 10th Avenue,
2nd Floor
Topeka, KS 66612-1597

J. JOSEPH CURRAN, JR.
Attorney General
of Maryland
200 Saint Paul Place
Baltimore, MD 21202-2202

THOMAS F. REILLY
Attorney General
of Massachusetts
One Ashburton Place
Boston, MA 02108

JIM HOOD
Attorney General
of Mississippi
DEPARTMENT OF JUSTICE
P.O. Box 220
Jackson, MS 39205-0220

JEREMIAH W. (JAY) NIXON
Attorney General of Missouri
Supreme Court Building
207 West High Street
Jefferson City, MO 65101

MIKE MCGRATH
Attorney General of Montana
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

JON BRUNING
Attorney General of Nebraska
State Capitol
P.O. Box 98920
Lincoln, NE 68509-8920

BRIAN SANDOVAL
Attorney General of Nevada
Nevada Department
of Justice
100 North Carson Street
Carson City, NV 89701

JIM PETRO
Attorney General of Ohio
150 East Gay Street,
23rd Floor
Columbus, OH 43215

W.A. DREW EDMONDSON
Attorney General of Oklahoma
2300 North Lincoln
Boulevard, Suite 112
Oklahoma City, OK 73105

HARDY MYERS
Attorney General of Oregon
1162 Court Street NE
Salem, OR 97301

THOMAS W. CORBETT, JR.
Attorney General
of Pennsylvania
16th Floor, Strawberry Square
Harrisburg, PA 17120

ROBERTO J. SÁNCHEZ RAMOS
Secretary of Justice
Commonwealth of
Puerto Rico
P.O. Box 192
San Juan, PR 00902-0192

HENRY D. MCMASTER
Attorney General
of South Carolina
P.O. Box 11549
Columbia, SC 29211-1549

LAWRENCE E. LONG
Attorney General
of South Dakota
500 East Capitol Avenue
Pierre, SD 57501-5070

PAUL G. SUMMERS
Attorney General
of Tennessee
P.O. Box 20207
Nashville, TN 37243

GREG ABBOTT
Attorney General of Texas
Capitol Station
P.O. Box 12548
Austin, TX 78711-2548

MARK L. SHURTLEFF
Attorney General of Utah
Utah State Capitol Complex
East Office Building,
Suite 320
Salt Lake City, UT
84114-2320

JUDITH WILLIAMS JAGDMANN
Attorney General of Virginia
900 East Main Street
Richmond, VA 23219

ROB MCKENNA
Attorney General
of Washington
1125 Washington Street
P.O. Box 40100
Olympia, WA 98504-0100

DARRELL V. MCGRAW, JR.
Attorney General
of West Virginia
State Capitol, Room 26-E
Charleston, WV 25305

PEGGY A. LAUTENSCHLAGER
Attorney General
of Wisconsin
State Capitol, Suite 114 East
P.O. Box 7857
Madison, WI 53707-7857

PATRICK J. CRANK
Attorney General of Wyoming
123 State Capitol
Cheyenne, WY 82002

QUESTION PRESENTED

When a state prisoner challenging a state judgment amends a federal habeas corpus petition to include a new claim, does the amendment relate back to the date of the filing of the original petition, and thus avoid the one-year statute of limitations, based on the mere fact that the new claim stems from the prisoner's trial, conviction, or sentence?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
INTEREST OF *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	1
ARGUMENT	4
I. IN THE HABEAS CONTEXT, THE "CONDUCT, TRANSACTION, OR OCCURRENCE SET FORTH" IN THE ORIGINAL PLEADING IS THE FACTUAL BASIS FOR THE CONSTITUTIONAL VIOLATION	4
II. RELATION BACK UNDER RULE 15(C)(2) HAS ALWAYS BEEN INTERPRETED TO REQUIRE A COMMON FACTUAL NEXUS BETWEEN THE AMENDED CLAIMS AND THE ORIGINAL CLAIMS	12
CONCLUSION	22

TABLE OF AUTHORITIES

	Page
CASES	
Adams v. Armontrout, 897 F.2d 332 (8th Cir. 1990)	8
Baldwin County Welcome Ctr. v. Brown, 466 U.S. 147 (1984)	11, 14
Banks v. Dretke, 540 U.S. 668 (2004)	9
Barrett v. United States, 622 F. Supp. 574 (S.D.N.Y. 1985)	21
Bensel v. Allied Pilots Ass'n, 387 F.3d 298 (3d Cir. 2004)	15
Brown v. United States, 271 F. Supp. 2d 225 (D.D.C. 2003)	19
Burt v. CBS, Inc., 769 F. Supp. 1012 (S.D. Ohio 1990)	20
Conley v. Gibson, 355 U.S. 41 (1957)	7, 14
Dean v. United States, 278 F.3d 1218 (11th Cir. 2002)	8, 18
Ellzey v. United States, 324 F.3d 521 (7th Cir. 2003)	18
Engle v. Issac, 456 U.S. 107 (1982)	8
Farris v. United States, 333 F.3d 1211 (11th Cir. 2003)	3, 14
F.D.I.C. v. Jackson, 133 F.3d 694 (9th Cir. 1998)	15
Forzley v. AVCO Corp. Elec. Div., 826 F.2d 974 (11th Cir. 1987)	19
Gray v. Netherland, 518 U.S. 152 (1996)	17
Gustafson v. Alloyd Co., Inc., 513 U.S. 561 (1995)	11
Hawthorne v. Mac Adjustment, Inc., 140 F.3d 1367 (11th Cir. 1998)	10

TABLE OF AUTHORITIES – Continued

Page

Hibbs v. Winn, ___ U.S. ___, 24 S. Ct. 2276 (2004) 11

Hill v. Lockhart, 474 U.S. 52 (1985) 6

Holmes v. Greyhound Lines, Inc., 757 F.2d 1563 (5th Cir. 1985) 20

Hooper v. Sachs, 618 F. Supp. 963 (D.C. Md. 1985) 21

Jackson v. Suffolk County Homicide Bureau, 135 F.3d 254 (2d Cir. 1998) 21

James v. Borg, 24 F.3d 20 (9th Cir. 1994) 6

Kelly v. Small, 315 F.3d 1063 (9th Cir. 2003) 17

Lawton v. United States, 184 F. Supp. 2d 419 (E.D. Pa. 2002) 17

Leocal v. Ashcroft, ___ U.S. ___, 125 S. Ct. 377 (2004) 10

Mandacina v. United States, 328 F.3d 995 (8th Cir. 2003) 16

Martell v. Trilogy Ltd., 872 F.2d 322 (9th Cir. 1989) 16

Matter of Unroe, 937 F.2d 346 (7th Cir. 1991) 19

McFarland v. Scott, 512 U.S. 849 (1994) 6

McGregor v. Louisiana State Univ. Bd. of Sup'rs, 3 F.3d 850 (5th Cir. 1993) 19

Mederos v. United States, 218 F.3d 1252 (11th Cir. 2000) 16

Missouri, K. & T.R. Co. v. Wulf, 226 U.S. 570 (1913) 13

Monks v. Marlinga, 732 F. Supp. 749 (E.D. Mich. 1990) 20

Nelson v. Campbell, 541 U.S. 637 (2004) 20

TABLE OF AUTHORITIES – Continued

Page

Nettis v. Levitt, 241 F.3d 186 (2d Cir. 2001) 4, 19

New York Central & Hudson River R. Co. v. Kinney, 260 U.S. 340 (1922) 13

O'Loughlin v. Nat'l R.R. Passenger Co., 928 F.2d 24 (1st Cir. 1991) 7

Preiser v. Rodriguez, 411 U.S. 475 (1973) 20

Purkett v. Elem, 514 U.S. 765 (1995) 9

Ripley v. Childress, 695 F. Supp. 507 (D.N.M. 1988) 21

Rodriguez v. United States, 286 F.3d 972 (7th Cir. 2002) 18

Scarborough v. Principi, ___ U.S. ___, 124 S. Ct. 1856 (2004) 13

Schiavone v. Fortune, 477 U.S. 21 (1986) 16

Seaboard Air Line R. Co. v. Renn, 41 U.S. 290 (1916) 13

Seidel v. Lee, 954 F. Supp. 810 (D. Del. 1996) 20

Strickland v. Washington, 466 U.S. 668 (1984) 9

Tahoe Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency, 34 F.3d 753 (9th Cir. 1994) 19

Thompson v. Keohane, 516 U.S. 99 (1995) 9

Tiller v. Atlantic Coast Line R. Co., 323 U.S. 574 (1945) 2, 3, 13

United States v. Craycraft, 167 F.3d 451 (8th Cir. 1999) 9

United States v. Duffus, 174 F.3d 333 (3d Cir. 1999) 8

United States v. Hicks, 283 F.3d 380 (D.C. Cir. 2002) 8

TABLE OF AUTHORITIES – Continued

Page

United States v. Pittman, 209 F.3d 314 (4th Cir. 2000) 3, 8, 12, 19

Whitman v. American Trucking Associations, 531 U.S. 457 (2001) 9

Woodford v. Garceau, 538 U.S. 202 (2003) 4

Woodward v. Williams, 263 F.3d 1135 (10th Cir. 2001) 8

STATUTES

28 U.S.C. § 2242 4

28 U.S.C. § 2244 8

28 U.S.C. § 2255 ..... 8, 16

42 U.S.C. § 1983 20

RULES

Federal Rule of Civil Procedure 8 7

Federal Rule of Civil Procedure 10 10

Federal Rule of Civil Procedure 15 ..... *passim*

28 U.S.C. § 2254, Rule 2(c) 2, 5, 6

28 U.S.C. § 2254, Rule 11 17

OTHER MATERIALS

28 U.S.C. § 2254, Petition for Relief from a Conviction or Sentence By a Person in State Custody (Petition Under 28 U.S.C. § 2254 for a Writ of Habeas Corpus) 5

TABLE OF AUTHORITIES – Continued

Page

Advisory Committee Notes to 28 U.S.C. § 2254, Rule 2(c) 6

Advisory Committee Notes to 28 U.S.C. § 2254, Rule 4 6

Advisory Committee Note to the 1991 amendments of Federal Rule of Civil Procedure 15 14

BLACK'S LAW DICTIONARY (6th ed. 1990) 9, 10

FEDERAL PROCEDURE: LAWYERS EDITION (1996) 15

HERTZ, R. & LIEBMAN, J., FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE (3d ed. 1998) 6

LEWIS, JR., HAROLD S., *The Excessive History of Federal Rule 15(c) and its Lessons for Civil Rules Revision*, 85 MICH. L. REV. 1507 (1987) 15

MERRIAM WEBSTER'S COLLEGIATE DICTIONARY (10th ed. 1995) 7

MOORE, J., *Moore's Federal Practice* (2d ed. 1985) 15

WEBSTER'S NEW WORLD DICTIONARY (2d ed. 1986) 10

WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1986) 9

WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE: CIVIL 2D (1990) 3, 14

WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE: CIVIL 3D (2004) 6

INTEREST OF THE *AMICI CURIAE*

Amici States have a compelling interest in promoting the finality of their criminal convictions. In furtherance of this interest, the Antiterrorism and Effective Death Penalty Act (AEDPA) provides strict time limitations for state prisoners seeking federal habeas corpus relief. Absent specific enumerated exceptions, AEDPA requires prisoners to bring all their claims in one petition within a year of their state convictions becoming final. The Ninth Circuit, however, has construed Federal Rule of Civil Procedure 15(c)(2) in an unreasonably broad manner, which allows prisoners to amend their petitions to add an unlimited number of otherwise time-barred claims and make an end-run around AEDPA's 1-year limitation period. This construction amounts to a substantial judicial repeal of AEDPA's time-limitations. *Amici* States have a compelling interest in preventing such circumvention and ensuring that only timely-raised claims are subject to federal habeas review.

SUMMARY OF ARGUMENT

The Ninth Circuit's unreasonably broad construction of Federal Rule of Civil Procedure 15(c)(2) allows prisoners to add otherwise-time-barred claims even though they do not relate to the claims raised in the original petition. JA 8 ("[A] prisoner's new claim arises out of the same transaction or occurrence as his original petition because the transaction or occurrence in issue is his state trial and conviction."). Although this circumvents AEDPA's 1-year limitation period by allowing prisoners to bring *any* new claim regardless of its relation to the original claim(s), that is not the primary focus of this brief. Rather, the

arguments below demonstrate that the Ninth Circuit's holding is inconsistent with the plain language of Rule 15(c)(2), and inconsistent with the application of the rule in the general civil arena.

First, while the Ninth Circuit has construed Rule 15(c)(2) to allow an amendment to relate back to the original petition so long as it concerns the same trial and sentence, Rule 15(c)(2) only allows a new claim to relate back if it arose out of the same "conduct, transaction, or occurrence set forth" in the original pleading. Although a prisoner necessarily *references* his trial and conviction in a habeas application, the conduct, transaction, or occurrence *set forth* in the petition is that which, if true, would entitle the prisoner to habeas relief. In order to be entitled to habeas relief, a prisoner must allege facts amounting to a violation of a federal right. *See, e.g.*, 28 U.S.C. § 2254, Rule 2(c) (providing that a habeas petition must, *inter alia*, "specify all the grounds for relief available to the petitioner" and "state the facts supporting each ground"). Thus, in the habeas context, the relevant conduct, transaction, or occurrence set forth for purposes of Rule 15(c)(2) is the underlying factual predicate for the alleged violation of a federal right. A new claim, therefore, will only relate back under Rule 15(c)(2) if it arose out of the same set of facts set forth in the original petition.

Second, the Ninth Circuit's definition of "conduct, transaction, or occurrence" conflicts with the generally-accepted view that this phrase relates to the operative or core facts alleged in the original pleading. Indeed, this was the approach taken by this Court 60 years ago when it applied Rule 15(c)(2) in a wrongful death case. *Tiller v. Atlantic Coast Line R. Co.*, 323 U.S. 574, 580-81 (1945). There, both the original and amended claims involved the

death of the deceased at a railroad yard. *Id.* This Court held that the amendment alleging a statutory basis for relief related back when it "related to the same general conduct, transaction and occurrence which involved the death of the deceased." *Id.* at 581.

Consistent with *Tiller*, courts and commentators have given Rule 15(c)(2) a relatively narrow scope. Amendments that merely correct technical deficiencies or expand or modify the facts alleged in the original pleading will relate back, but those that present an entirely new claim for relief will not. *See generally,* 6A WRIGHT & MILLER, FED. PRAC. & PROC: CIV. 2D, § 1497 (2004); *see also Farris v. United States*, 333 F.3d 1211, 1215 (11th Cir. 2003) ("Congress . . . did not inten[d] for [Rule 15(c)] to be so broad to allow an amended pleading to add an entirely new claim based on a different set of facts."). Given these parameters, the general standard has been that relation back is allowed when a new claim arises out of the same operative or core facts alleged in the original claim. A claim in the habeas context is a fact-based assertion that a particular federal right was violated. Amendments clarifying or modifying the facts alleged in the original petition, therefore, relate back, while entirely new claims alleging violations of other rights do not.

As noted by the Fourth Circuit, construing "conduct, transaction, or occurrence" as a prisoner's trial and sentence interprets the relevant events "at too high a level of generality." *United States v. Pittman*, 209 F.3d 314, 318 (4th Cir. 2000). Such a general relationship is an insufficient basis to allow for the relation back of amendments. An employee, for example, may not amend a complaint to add new claims against an employer merely because the claims arose out of the same employer-employee relationship. *See,*

e.g., Nettis v. Levitt, 241 F.3d 186, 193 (2d Cir. 2001) (proposed amendment alleging employment retaliation did not relate back where it was "based on an entirely distinct set of protected employee activity"). Thus, even in the general civil context, Rule 15(c)(2) only allows relation back when there is a specific factual relation between the claims asserted in the new and the original claim.

In sum, both the plain language of Rule 15(c)(2) and the construction of the rule in the general civil arena demonstrate that the Ninth Circuit's interpretation of "conduct, transaction, or occurrence" to mean a prisoner's trial and sentence is untenable.

ARGUMENT

I. IN THE HABEAS CONTEXT, THE "CONDUCT, TRANSACTION, OR OCCURRENCE SET FORTH" IN THE ORIGINAL PLEADING IS THE FACTUAL BASIS FOR THE CONSTITUTIONAL VIOLATION.

Federal Rule of Civil Procedure 15(c)(2) provides: "An amendment of a pleading relates back to the date of the original pleading when . . . the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading."[1] Purporting to apply a "literal

[1] A habeas petition may be amended as provided in the Rules of Civil Procedure. 28 U.S.C. § 2242. The "original habeas petition," therefore, would be the "original pleading" referenced in Rule 15(c)(2). *See Woodford v. Garceau*, 538 U.S. 202, 208 (2003) ("[A] habeas suit begins with the filing of an application for habeas corpus relief – the equivalent of a complaint in an ordinary civil case.").

application of Rule 15(c)," the Ninth Circuit held that, in the habeas context, "conduct, transaction, or occurrence" encompasses a petitioner's entire "trial and conviction." JA 11. This, however, misconstrues Rule 15(c)(2)'s limiting parameters.

1. The application of Rule 15(c)(2) in the habeas context necessarily involves a determination of what conduct, transaction, or occurrence is "set forth" in a habeas petition. This is controlled by Habeas Rule 2(c), which provides, *inter alia*, that a habeas petition must: "(1) specify all the grounds for relief available to the petitioner; [and] (2) state the facts supporting each ground." 28 U.S.C. § 2254, Rule 2(c).[2] Rule 2(c)'s fact-pleading requirement is incorporated into the *pro se* form annexed to the Rules Governing Section 2254 in the United States District Courts:

> CAUTION: You must include in this petition all the grounds for relief from the conviction or sentence that you challenge. And you must state the facts that support each ground. If you fail to set forth all the grounds in this petition, you may be barred from presenting additional grounds at a later date.

28 U.S.C. § 2254, Petition for Relief from a Conviction or Sentence By a Person in State Custody (Petition Under 28 U.S.C. § 2254 for a Writ of Habeas Corpus), at 1 (original emphasis); *see also id.* at 6 (instructing prisoners to "[s]tate the *facts* supporting each ground" and informing

[2] The former version of the rule similarly provided that a habeas petition "shall specify all the grounds for relief . . . and shall set forth in summary form the facts supporting each of the grounds thus specified." 28 U.S.C. § 2254, Rule 2(c) (amended effective Dec. 1, 2004).

them they are not required to "argue or cite law," but rather are only required to "state the specific facts that support" each claim) (original emphasis); *see also McFarland v. Scott*, 512 U.S. 849, 856 (1994) (citing 28 U.S.C. § 2254 Rule 2(c) and stating that "[h]abeas corpus petitions must meet heightened pleading requirements").

As observed in the comments to Habeas Rule 2(c), "it is the relationship of the facts to the claim asserted that is important" in a habeas petition. 28 U.S.C. § 2254, Rule 2(c) Advisory Committee Notes; *see also* 28 U.S.C. § 2254, Rule 4 Advisory Committee Notes ("[N]otice pleading is not sufficient, for [a habeas] petition is expected to state facts that point to a real possibility of constitutional error.") (citation and internal quotations omitted); 1 R. HERTZ & J. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 11.6 (3d ed. 1998) (noting that the "fact pleading" requirement of the habeas rules is more stringent than "notice pleading" and requires petitioners to "at least summarily plead specific facts supporting each claim for relief").

Indeed, a habeas petition that does not set forth a factual basis for a claim is subject to dismissal. *See McFarland*, 512 U.S. at 856 ("Federal courts are authorized to dismiss summarily any habeas petition that appears legally insufficient on its face. . . ."); *see also Hill v. Lockhart*, 474 U.S. 52, 60 (1985) (affirming dismissal of a habeas petition without a hearing when it did not allege sufficient facts to demonstrate the prejudice required for an ineffective assistance of counsel claim); *James v. Borg*, 24 F.3d 20, 26 (9th Cir. 1994) ("Conclusory allegations which are not supported by a statement of specific facts do not warrant habeas relief."); *see also* WRIGHT & MILLER, 5 FED. PRAC. & PROC. CIV. 3D § 1241.1, at 420 (2004) ("A

petition for a writ of habeas corpus has been held insufficient if it alleges conclusions that are not supported by facts."). Therefore, given the fact-specific pleading requirements of a habeas petition, the "conduct, transaction, or occurrence set forth" in a petition necessarily refers to the *facts* set forth in the petition.

2. Even if the fact-pleading requirements of Habeas Rule 2(c) are not considered, the Ninth Circuit's holding still ignores Rule 15(c)'s requirement that, in order to relate back, a new claim must arise from the conduct, transaction or occurrence "set forth" in the original pleading. Fed. R. Civ. P. 15(c)(2). *See* MERRIAM WEBSTER'S COLLEGIATE DICTIONARY, 1071 (10th ed. 1995) ("set forth" means "to give an account or statement of"). Any type of pleading document must set forth some type of claim by alleging minimal facts that support a cognizable ground for relief. *See, e.g.*, Fed. R. Civ. P. 8(a)(2) ("A pleading which sets forth a claim for relief . . . shall contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief. . . ."); *see also Conley v. Gibson*, 355 U.S. 41, 47 (1957) (noting that even under the current liberal pleading requirements, a complaint must nonetheless "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests"). The conduct, transaction, or occurrence set forth in any pleading document, therefore, is the factual scenario a particular claim is predicated upon. *See, e.g., O'Loughlin v. Nat'l R.R. Passenger Corp.*, 928 F.2d 24, 27-28 (1st Cir. 1991) (noting that in cases where amendments are allowed under Rule 15(c)(2), "it was the allegations in the complaints that provided the most substantial notice of the transaction or occurrence at issue"). A new claim, therefore, can only

relate back if it arose from the factual basis that underpins the claim(s) set forth in the original pleading.

A habeas claim is predicated on specific facts alleging a violation of a federal right. *See. e.g., Engle v. Issac*, 456 U.S. 107, 119 (1982) (a challenge to a state court's evidentiary ruling is not cognizable in a habeas petition because it alleges "no deprivation of federal rights"); *see also* 28 U.S.C. § 2244(b)(2)(B) (using the term "factual predicate" in reference to second or successive petitions). In other words, a habeas claim is no claim at all if it does not contain sufficient facts to allege a violation of federal rights. Therefore, a habeas petition that merely "set forth" a prisoner's "trial and conviction" would clearly be insufficient. *See, e.g., Adams v. Armontrout*, 897 F.2d 332, 333 (8th Cir. 1990) ("We do not believe that 28 U.S.C. § 2254 or the Section 2254 Rules require the federal courts to review the entire state court record of habeas corpus petitioners to ascertain whether facts exist which support relief.") (collecting cases). Thus, although a habeas petition may *reference* the prisoner's trial and sentence, the trial and sentence are not the relevant conduct, transaction, or occurrence *set forth* as a basis for a constitutional claim. Indeed, a majority of Circuit Court of Appeals have come to this conclusion in determining the scope of Rule 15(c)(2) to cases arising under 28 U.S.C. § 2255. *See United States v. Hicks*, 283 F.3d 380, 388 (D.C. Cir. 2002); *Dean v. United States*, 278 F.3d 1218, 1221 (11th Cir. 2002); *Woodward v. Williams*, 263 F.3d 1135, 1142 (10th Cir. 2001); *United States v. Pittman*, 209 F.3d 314, 317-18 (4th Cir. 2000); *United States v. Duffus*, 174 F.3d 333, 337-38 (3d Cir. 1999); *United States v. Craycraft*, 167 F.3d 451, 457 (8th Cir. 1999).[3]

3. By ignoring the requirement that the relevant "conduct, transaction, or occurrence" be *set forth* in the original pleading, the Ninth Circuit ignores the context in which these terms are used. *See Whitman v. American Trucking Associations*, 531 U.S. 457, 466 (2001) ("Words that can have more than one meaning are given content . . . by their surroundings. . . ."). Since all pleadings have *some* factual basis, "conduct," in the context of a pleading requirement, can only mean particular behavior that forms the basis for a claim. *See, e.g.*, BLACK'S LAW DICTIONARY, 295 (6th ed. 1990) (defining "conduct" as: "Personal behavior; deportment; mode of action; any positive or negative act."); WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, 474 (1986) (defining "conduct" as "behavior in a particular situation"). In the habeas context, the word "conduct" can readily be applied to specific action by the state, counsel, or the trial court, which allegedly constitutes a violation of federal or constitutional rights. *See, e.g., Banks v. Dretke,* 540 U.S. 668, 696 (2004) (discussing the "conduct" of a prosecutor as relevant to a *Brady* violation); *Thompson v. Keohane*, 516 U.S. 99, 100 (1995) (discussing a "law enforcement officer's conduct" in regard to *Miranda* issue); *Purkett v. Elem,* 514 U.S. 765, 768 (1995) (discussing trial judge's role in deciding *Batson* challenges); *Strickland v. Washington,* 466 U.S. 668, 686

[3] Although some of these decisions discuss the ramifications of an overly-broad construction of Rule 15(c)(2) to AEDPA's limitations periods, ultimately their holdings rest on a plain application of the rule. *See, e.g., Craycraft*, 167 F.3d at 457 ("Failing to file an appeal is a separate occurrence in both time and type from a failure to pursue a downward departure or failure to object to the type of drugs at issue.").

(1984) (discussing defense counsel's "conduct" in the context of an ineffective assistance of counsel claim). Thus, in the habeas context, "conduct" necessarily means the specific factual basis for a particular constitutional claim.

The ordinary meaning of "transaction," on the other hand, "necessarily implies some type of business dealing between parties." *Hawthorne v. Mac Adjustment, Inc.*, 140 F.3d 1367, 1371 (11th Cir. 1998); *see also* BLACK'S, at 1496 (defining "transaction" as the "[a]ct of transacting or conducting any business;"); WEBSTER'S NEW WORLD DICTIONARY, 1509 (2d ed. 1986) (defining "transaction" as "a business deal or agreement"). A criminal trial is simply not a "transaction" in any usual sense of the word. *See* BLACK'S, at 1504 (defining trial as "[a] judicial examination and determination of issues between parties to action, whether they be issues of law or of fact, before a court that has jurisdiction."). Thus, the term "transaction," as used in Rule 15(c)(2), has no ready application in habeas proceedings.

Granted, out of context, the flexible word "occurrence" can be broadly construed to include a criminal trial. *See* BLACK'S, at 1080 (defining "occurrence" to include "[a]ny incident or event"). Context, however, is particularly important where a term is pliable. *See, e.g., Leocal v. Ashcroft*, ___ U.S. ___, 125 S. Ct. 377, 382 (2004) ("Particularly when interpreting a statute that features as elastic a word as 'use,' we construe language in its context and in light of the terms surrounding it."). Rule 15(c)(2) references "conduct, transaction, or occurrence" as events set forth in an original pleading. The relevance of the conduct, transaction, or occurrence is that it provides the basis for legal action. *Cf.* Fed. R. Civ. P. 10(b) ("Each claim founded upon a separate transaction or occurrence ... shall be

stated in a separate count ... whenever a separation facilitates the clear presentation of the matters set forth."). Thus, although a broad definition of "occurrence" could conceivably encompass a trial, in the context of Rule 15(c)(2), the occurrence set forth in a habeas petition is necessarily a specific violation of a federal right.

The conclusion that "occurrence," as used in Rule 15(c)(2), should not be construed to give it unlimited scope is supported by the doctrine of *noscitur a sociis*, which means that "a word is known by the company it keeps." *Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 575 (1995). This doctrine avoids "ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving [a statute] unintended breadth." *Id.* (internal quotations and citation omitted). This doctrine, in turn, is complemented by "the rule against superfluities," which "instructs courts to interpret a statute to effectuate all its provisions, so that no part is rendered superfluous." *Hibbs v. Winn*, ___ U.S. ___, 124 S. Ct. 2276, 2286 (2004). If "occurrence" is construed so broadly as to include any incident or event (including a trial, conviction, or sentence), the terms "conduct" and "transaction" would be rendered superfluous because the "occurrence" alone "would do all the necessary work." *Id.* Thus, because "conduct" and "transaction" are terms that denote specific facts, "occurrence," too, must be also be construed to denote a "particular occurrence" which forms a claimed basis for relief. *Cf. Baldwin County Welcome Ctr. v. Brown*, 466 U.S. 147, 150 n.3 (1984) (noting that the rationale of the relation back allowed by Rule 15(c) is that a party has been given notice of a "*particular* occurrence") (emphasis added).

Further, in construing "conduct, transaction, or occurrence," it is noteworthy that a claim also relates back when it arises out of the "conduct, transaction, or occurrence . . . *attempted to be set forth* in the original pleading." Fed. R. Civ. P. 15(c)(2) (emphasis added). Thus, the Rule recognizes that, in some instances, an initial claim may not be cognizable because of the lack of factual specificity. This highlights that the facts or allegations in a pleading must not merely reference some general relationship between two parties or some general background context, but rather must set forth sufficient specific conduct that constitutes a cognizable claim.

In short, the Ninth Circuit construed the phrase "conduct, transaction, or occurrence" at "too high a level of generality." *Pittman* 209 F.3d at 318. Because a prisoner is required to plead facts to support a claim for habeas relief based on a specific constitutional violation, it is those facts that constitute the relevant "conduct, transaction, or occurrence" for purposes of Rule 15(c)(2). The Ninth Circuit erred, therefore, when it construed Rule 15(c)(2)'s relation back provision to encompass the entirety of a prisoner's trial and sentence, regardless of the facts set forth in the initial application.

II. RELATION BACK UNDER RULE 15(C)(2) HAS ALWAYS BEEN INTERPRETED TO REQUIRE A COMMON FACTUAL NEXUS BETWEEN THE AMENDED CLAIMS AND THE ORIGINAL CLAIMS.

1. Although the above analysis largely focuses on the fact-pleading requirements in habeas proceedings, courts and commentators have always construed Rule 15(c)(2) to require a factual nexus between the amended and the

original claims. Indeed, this was the approach taken by the courts even prior to the 1938 effective date of the Federal Rules of Civil Procedure. As this Court recently noted, the concept of "relation back" existed as an equitable doctrine prior to the adoption of the Rules of Civil Procedure. *Scarborough v. Principi*, ___ U.S. ___, 124 S. Ct. 1856, 1867 (2004). In discussing the history of the doctrine, *Scarborough* cites three pre-1938 train-injury cases, each of which allowed a plaintiff to amend a wrongful death complaint to add a claim – based on the same facts – that the death violated the Employers' Liability Act. *Id.*[4] Consistent with this pre-Rule precedent, this Court subsequently construed Rule 15(c)(2) to allow a plaintiff to add a new theory of recovery for a wrongful death action where both the original and amended claims sought "to recover damages for the alleged wrongful death of the deceased." *Tiller v. Atlantic Coast Line R. Co.*, 323 U.S. 574, 580-81 (1945). Applying the language of Rule 15(c)(2), the Court stated that the allegations in both claims "related to the same general conduct, transaction and occurrence which involved the death of the deceased." *Id.*

More recently, this Court commented, albeit in passing, that for the purposes of Rule 15(c)(2), an amendment

---

[4] *See New York Central & Hudson River R. Co. v. Kinney*, 260 U.S. 340, 346 (1922) (amended complaint related back to wrongful death action because the amendment merely "expanded or amplified" the conduct alleged in the original claim); *Seaboard Air Line R. Co. v. Renn*, 241 U.S. 290, 293-94 (1916) (allowing amendment where "[t]he facts constituting the tort were the same" as originally set forth); *Missouri, K. & T.R. Co. v. Wulf*, 226 U.S. 570, 575-76 (1913) (allowing amendment that did not "modify[ ] or enlarg[e] the facts upon which the action was based").

relates back if it concerns "a particular occurrence" noticed in the original pleading. *Baldwin County Welcome Ctr. v. Brown*, 466 U.S. 147, 150 n.3 (1984). This comment was followed by an admonition that, even under a liberal pleading standard, a pleading must "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Id.* (citing *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). Therefore, this Court's limited discussion of Rule 15(c)(2) has been consistent with the general, narrow scope that Rule 15(c) is given by the commentators:

> [A]mendments that merely correct technical deficiencies or expand or modify the facts alleged in the earlier pleading meet the Rule 15(c) test and will relate back. Thus, amendments that do nothing more than restate the original claim with greater particularity or amplify the details of the transaction alleged in the preceding pleading fall within Rule 15(c). But, if the alteration of the original statement is so substantial that it cannot be said that [the other party] was given adequate notice of the conduct, transaction, or occurrence that forms the basis for the claim or defense, then the amendment will not relate back and will be time barred if the limitations period has expired.

6A WRIGHT & MILLER, FED. PRAC. & PROC. CIV. 2D § 1497, at 74-79 (1990); *see also Farris v. United States*, 333 F.3d 1211, 1215 (11th Cir. 2003) ("Congress intended Rule 15(c) to be used for a relatively narrow purpose; it did not inten[d] for the rule to be so broad to allow an amended pleading to add an entirely new claim based on a different set of facts."); Fed. R. Civ. P. 15, Advisory Committee Note to the 1991 amendments ("the rule has been revised to prevent parties against whom claims are made from

taking unjust advantage of otherwise inconsequential pleading errors to sustain a limitations defense."); 27A FEDERAL PROCEDURE: LAWYERS EDITION § 62:338 p. 129 (1996) ("[A] new and totally unrelated cause of action will not relate back."); 3 J. MOORE, *Moore's Federal Practice* ¶ 15.15[3], at 15-147 to 149 (2d ed. 1985) ("[A]n amendment which states an entirely new claim for relief based on different facts will not relate back.").

2. Consistent with Rule 15(c)'s generally-recognized narrow scope, in order to relate back an amended claim must contain the same set of core or operative facts as contained in the original pleading. *See, e.g., Bensel v. Allied Pilots Ass'n*, 387 F.3d 298, 310 (3d Cir. 2004) ("In essence, application of Rule 15(c) involves a search for a common core of operative facts in the two pleadings."). Thus, Rule 15(c)(2)'s "arising out" approach to relation back allows courts "to measure the allegations of the amended pleading against the relatively concrete datum of operative facts" in the original complaint. HAROLD S. LEWIS, JR., *The Excessive History of Federal Rule 15(c) and its Lessons for Civil Rules Revision*, 85 MICH. L. REV. 1507, 1513 (1987); *see also* 27A FEDERAL PROCEDURE: LAWYERS EDITION § 62:336, at 127 (1996) ("The District Court should analyze the original complaint and proposed amendment in order to determine whether they shared a common core of operative facts sufficient to impart fair notice of the transaction, occurrence, or conduct called into question."). Indeed, the Ninth Circuit generally applies the "operative facts" test to determine if an amendment relates back. *See, e.g., F.D.I.C. v. Jackson*, 133 F.3d 694, 702 (9th Cir. 1998) (stating that a district court should compare the amended claim to the original pleading "to determine whether they share a common core of operative

facts sufficient to impart fair notice of the transaction, occurrence, or conduct called into question") (internal quotation and citation omitted); *Martell v. Trilogy Ltd.*, 872 F.2d 322, 326 (9th Cir. 1989) (allowing relation back "where the facts originally alleged against [the defendant] share[d] a common core of operative facts" with those in the amended pleading).

The Ninth Circuit rejected this approach in the instant case, however, because it believed it would render Rule 15(c)(2) "virtually meaningless in the habeas context." JA at 11. Apparently, therefore, the Ninth Circuit recognized the correct standard, but decided to apply a different one so that Rule 15(c)(2) is more readily available in the habeas context. As this Court has stated in considering Rule 15(c)(3), however, a Rule of Civil Procedure should be construed as "meaning what it says." *Schiavone v. Fortune*, 477 U.S. 21, 30 (1986) (declining to chose between a "liberal" and "technical" approach toward Rule 15(c)(3) and, instead, accepting "the Rule as meaning what it says"). What Rule 15(c)(2) says is that new claims relate back only if they arose from the same "conduct, transaction, or occurrence set forth" in the original pleading – it does not say that new claims relate back if they have "some general relation" to that pleading.

3. Further, a straight-forward application of Rule 15(c)(2) does have a place in the habeas context. *See, e.g.*, *Mandacina v. United States*, 328 F.3d 995, 1000-01 (8th Cir. 2003) (amended *Brady* claim concerning particular report related back to original *Brady* claim that government failed to disclose investigative information obtained by a particular police department); *Mederos v. United States*, 218 F.3d 1252, 1253-54 (11th Cir. 2000) (second § 2255 motion that corrected technical deficiencies related back to the original motion); *Lawton v. United States*, 184 F. Supp. 2d 419, 424 (E.D. Pa. 2002) (amended claim that "amplified" the facts in the original petition related back). Rule 15(c)(2), however, should not be stretched in the habeas proceedings merely so that it will have greater application than the language of the rule itself provides.[5]

Given the unique nature of habeas proceedings, it is only to be expected that Rule 15(c)(2) will have a somewhat limited role. The typical claims governed by the Federal Rules of Civil Procedure have not previously been processed through state court proceedings. In contrast, the *only* claims that can form the basis for habeas relief are those that *have been presented* to the state courts. *See Gray v. Netherland*, 518 U.S. 152, 162-63 (1996) ("[F]or purposes of exhausting state remedies, a claim for relief in habeas corpus must include reference to a specific federal constitutional guarantee, as well as a statement of the facts that entitle the petitioner to relief."); *see also Kelly v. Small*, 315 F.3d 1063, 1066 (9th Cir. 2003) ("The state prisoner must describe in the state proceedings both the *operative facts* and the federal legal theory on which his claim is based so that the state courts have a 'fair opportunity' to apply controlling legal principles to the facts bearing upon his constitutional claim.") (emphasis added). Thus, unlike a civil litigant, who may develop a new theory of relief through discovery, as well as the factual

---

[5] Habeas Rule 11 provides: "The Federal Rules of Civil Procedure, to the extent that they are not inconsistent with any statutory provisions or these rules, may be applied to a proceeding under these rules." 28 U.S.C. § 2254, Rule 11. The Ninth Circuit's analysis, however, turns Rule 11 on its head by expanding the scope of a Federal Rule of Civil Procedure so it will have greater applicability than the language of the Rule itself permits.

basis thereof, habeas litigants are generally in a position to know their grounds for relief when they come to federal court. It is only to be expected, therefore, that Rule 15(c)(2) will have a more limited application in habeas proceedings.

4. In reaching its conclusion that conduct, transaction, or occurrence means a prisoner's "trial and sentence," the Ninth Circuit relied heavily on the Seventh Circuit's decision in *Ellzey v. United States*, 324 F.3d 521 (7th Cir. 2003). In *Ellzey*, the Seventh Circuit acknowledged that a habeas petition requires "fact pleading," but nevertheless concluded that "[a] prisoner who comes up with ten different ways to contest his sentence still is litigating about a single transaction or occurrence (the supposedly unlawful sentence)."[6] 324 F.3d at 524, 526. A state prisoner, however, is not "litigating about" his trial or sentence, he is "litigating about" a claimed violation of a federal right. As discussed in Section I, *supra*, a prisoner who merely "sets forth" his trial and sentence as a basis for relief does not state a cognizable habeas claim. Thus, like the Ninth Circuit, the Seventh Circuit ignored Rule 15(c)(2)'s requirement that, in order to relate back, an amendment must arise out of the "conduct, transaction, or occurrence set forth" in the original pleading, which, in the habeas context, is the claimed violation of rights.

[6] *Ellzey* effectively overruled a Seventh Circuit decision adopting the view taken by the other circuits, namely, that in order for a claim to relate back, it must have "more in common with the timely filed claim than the mere fact that they arose out of the same trial and sentencing proceedings." *Rodriguez v. United States*, 286 F.3d 972, 980 (7th Cir. 2002) (citing *Dean v. United States*, 278 F.3d 1218, 1221 (11th Cir. 2002)).

Again, at bottom, construing a trial (or sentencing) as the relevant event for the purposes of Rule 15(c)(2) improperly interprets conduct, transaction, or occurrence "at too high a level of generality." *Pittman* 209 F.3d at 318. Courts have refused to allow a claim to relate back where there is no relation to the original claim other than being part of some general overall dispute between the parties. *See, e.g., Nettis v. Levitt*, 241 F.3d 186, 193 (2d Cir. 2001) (proposed amendment alleging employment retaliation did not relate back where it was "based on an entirely distinct set of protected employee activity"); *Tahoe Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 34 F.3d 753, 755 as amended, 42 F.3d 1306 (9th Cir. 1994) (property owners' amended claims against regional planning agency concerning a second plan did not relate back to the original complaint based on the first plan); *McGregor v. Louisiana State Univ. Bd. of Sup'rs*, 3 F.3d 850, 863-64 (5th Cir. 1993) (amended claim alleging due process violations in regard to denial of request to go to law school on part-time basis did not relate back to original complaint alleging law school failed to reasonably accommodate disability); *Matter of Unroe*, 937 F.2d 346, 349 (7th Cir. 1991) (IRS could not amend tax claim for one year to include new claims for additional years that would otherwise be barred by the statute of limitations); *Forzley v. AVCO Corp. Elec. Div.*, 826 F.2d 974, 981-82 (11th Cir. 1987) (holding that a claim "for retroactive overtime pay did not arise out of the transaction or occurrence of the original complaint," which was for breach of contract). *Brown v. United States*, 271 F. Supp. 2d 225, 230 (D.D.C. 2003) (employee's amended complaint alleging breach of settlement agreement did not relate back to her timely filed original complaint alleging race discrimination because the two matters did not deal with the same

nucleus of facts, time periods, or legal theories); *Seidel v. Lee*, 954 F. Supp. 810, 815 (D. Del. 1996) (eight separate investment transactions did not relate back to original complaint because defendants lacked adequate notice there would be claims based on additional transactions); *Burt v. CBS, Inc.*, 769 F. Supp. 1012, 1015-16 (S.D. Ohio 1990) (second-amended complaint, which first set forth defamation claim arising out of third television broadcast program regarding plaintiff's medical practice, did not relate back to filing date of original complaint which asserted claims arising out of only two previous broadcasts of program because each broadcast constituted a distinct cause of action for defamation); *Monks v. Marlinga*, 732 F. Supp. 749, 754 (E.D. Mich. 1990) (claim of former prosecutors that he was slandered following termination did not arise out of conduct, transaction, or occurrence set forth in original pleading challenging discharge); *Holmes v. Greyhound Lines, Inc.*, 757 F.2d 1563, 1566 (5th Cir. 1985) (amended complaint alleging that union breached duty of fair representation did not relate back to original complaint alleging arbitration award should be set aside because of arbitrators' conduct).

5. Finally, because a federal habeas claim must allege facts amounting to a violation of federal law, § 1983 cases addressing Rule 15(c)(2) are particularly instructive. *Cf. Nelson v. Campbell*, 541 U.S. 637, 124 S. Ct. 2117, 2122-25 (2004) (noting the similarities of a habeas claim and a § 1983 claim); *Preiser v. Rodriguez*, 411 U.S. 475, 489 (1973) (holding that, although "the literal terms of § 1983" would appear to cover habeas challenges, the more specific habeas statutory scheme controls where prisoners challenge the fact or length of their confinement). Consistent with the above analysis, these cases have allowed an

amendment to relate back to the original complaint *only* if it arose out of the specific conduct, transaction, or occurrence that forms the basis for the specific constitutional violation. *Compare Jackson v. Suffolk County Homicide Bureau*, 135 F.3d 254, 256 (2d Cir. 1998) (even though § 1983 claims generally arose out of the same state-court criminal proceedings, plaintiff's First Amendment claims did not relate back because they did not arise out of the same conduct as the excessive force claim); *Hooper v. Sachs*, 618 F. Supp. 963, 977 (D. Md. 1985) (amended § 1983 claim alleging illegal search and seizure did not relate back to complaint alleging unlawful prosecution claims because they were not based on the same "operational facts"), *with Ripley v. Childress*, 695 F. Supp. 507, 511-12 (D.N.M. 1988) (with one exception, amendments to arrestee's civil rights complaint would relate back to date of original complaint because they did not change the factual allegations in the original complaint in any substantial manner); *Barrett v. United States*, 622 F. Supp. 574, 592 (S.D.N.Y. 1985) (allowing plaintiff to amend § 1983 action to add a *Bivens* claim was permissible because the claims paralleled each other and, thus, constituted the "same transaction or occurrence").

In sum, both the plain language of Rule 15(c)(2) and the consistent application of the rule in the general civil arena demonstrate that the Ninth Circuit erred when it concluded that "the conduct, transaction, or occurrence set forth" in a habeas petition encompasses a state prisoner's entire trial, conviction, and sentence.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

TERRY GODDARD
Attorney General of the State of Arizona

MARY O'GRADY
State Solicitor General

RANDALL M. HOWE
Criminal Appeals Section Chief

MICHAEL O'TOOLE
Assistant Attorney General and
(*Counsel of Record*)
1275 W. Washington St.
Phoenix, AZ 85007
(602) 542-8593

Of Counsel:

DAN SCHWEITZER
750 First St., N.E.
Washington, D.C. 20002
(202) 326-6010

(6)

Supreme Court, U.S.
FILED
FEB 22 2005
OFFICE OF THE CLERK

No. 04-563

IN THE

Supreme Court of the United States

DENEICE A. MAYLE, Warden,

Petitioner,

vs.

JACOBY LEE FELIX,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

KENT S. SCHEIDEGGER
CHARLES L. HOBSON
Counsel of Record
Criminal Justice Legal Fdn.
2131 L Street
Sacramento, CA 95816

Phone: (916) 446-0345
Fax: (916) 446-1194
E-mail: cjlf@cjlf.org

Attorneys for Amicus Curiae Criminal Justice Legal Foundation

QUESTION PRESENTED

When a habeas petitioner challenging a state judgment amends his petition to include a new claim, does the amendment relate back to the date of the filing of his petition and thus avoid the one-year statute of limitations, 28 U. S. C. § 2244(d)(1), so long as the new claim stems from the prisoner's trial, conviction, or sentence?

TABLE OF CONTENTS

Question presented i

Table of authorities iv

Interest of *amicus curiae* 1

Summary of facts and case 2

Summary of argument 6

Argument 7

I

Federal Rule of Civil Procedure 15(c)(2) should be interpreted in harmony with the unique challenges of federal habeas corpus 7

II

The Ninth Circuit's decision to allow unlimited amendment of habeas petitions under Rule 15(c)(2) is incompatible with the AEDPA 13

A. Unlimited amendment 14

B. Unlimited amendment and finality 18

III

In habeas actions, the relevant "conduct, transaction, or occurrence" for relating back an amended petition under Rule 15(c)(2) must at least come from the same core set of facts as a timely filed claim 20

Conclusion 22

TABLE OF AUTHORITIES

Cases

Allen v. McCurry, 449 U. S. 90, 66 L. Ed. 2d 308, 101 S. Ct. 411 (1980) 8

American Pipe & Constr. Co. v. Utah, 414 U. S. 538, 38 L. Ed. 2d 713, 94 S. Ct. 756 (1974) 9

Baldwin County Welcome Center v. Brown, 466 U. S. 147, 80 L. Ed. 2d 196, 104 S. Ct. 1723 (1984) 9

Barefoot v. Estelle, 463 U. S. 880, 77 L. Ed. 2d 1090, 103 S. Ct. 3383 (1983) 19

Bonin v. California, 59 F. 3d 815 (CA9 1995) 17

Branch v. Smith, 538 U. S. 254, 155 L. Ed. 2d 407, 123 S. Ct. 1429 (2003) 21

Crown, Cork & Seal Co. v. Parker, 462 U. S. 345, 76 L. Ed. 2d 628, 103 S. Ct. 2392 (1983) 9

Davenport v. United States, 217 F. 3d 1341 (CA11 2000) 20

Edwards v. Carpenter, 529 U. S. 446, 146 L. Ed. 2d 518, 120 S. Ct. 1587 (2000) 10

Ellzey v. United States, 324 F. 3d 521 (CA7 2003) 8

Felix v. Mayle, 379 F. 3d 612 (CA9 2004) 4, 5, 8, 14, 15, 17, 20

Fellers v. United States, 540 U. S. 519, 157 L. Ed. 2d 1016, 124 S. Ct. 1019 (2004) 20

Fisher v. Baker, 203 U. S. 174, 51 L. Ed. 142, 27 S. Ct. 135 (1906) 8

Foman v. Davis, 371 U. S. 178, 9 L. Ed. 2d 222, 83 S. Ct. 227 (1962) 15

Harris v. Nelson, 394 U. S. 286, 22 L. Ed. 2d 281, 89 S. Ct. 1082 (1969) 8, 21

Holmberg v. Armbrecht, 327 U. S. 392, 90 L. Ed. 743, 66 S. Ct. 582 (1946) 9

In re Dixon, 41 Cal. 2d 756, 264 P. 2d 513 (1953) 10

Jackson v. Virginia, 443 U. S. 307, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979) 19

Johnson v. Railway Express Agency, Inc., 421 U. S. 454, 44 L. Ed. 2d 295, 95 S. Ct. 1716 (1975) 10

Lindh v. Murphy, 521 U. S. 320, 138 L. Ed. 2d 481, 117 S. Ct. 2059 (1997) 11

Lonchar v. Thomas, 517 U. S. 314, 134 L. Ed. 2d 440, 116 S. Ct. 1293 (1996) 16

Massiah v. United States, 377 U. S. 201, 12 L. Ed. 2d 246, 84 S. Ct. 1199 (1964) 20

Miranda v. Arizona, 384 U. S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966) 20

O'Sullivan v. Boerckel, 526 U. S. 838, 144 L. Ed. 2d 1, 119 S. Ct. 1728 (1999) 10

Park v. California, 202 F. 3d 1146 (CA9 2000) 10

People v. Green, 3 Cal. 3d 981, 92 Cal. Rptr. 494, 479 P. 2d 998 (1971) 4

Radzanower v. Touche Ross & Co., 426 U. S. 148, 48 L. Ed. 2d 540, 96 S. Ct. 1989 (1976) 21

Railroad Telegraphers v. Railway Express Agency, Inc., 321 U. S. 342, 88 L. Ed. 788, 64 S. Ct. 582 (1944) 9

Riley v. Taylor, 62 F. 3d 86 (CA3 1995) 15

Rose v. Mitchell, 443 U. S. 545, 61 L. Ed. 2d 739, 99 S. Ct. 2993 (1979) 8

Sanders v. United States, 373 U. S. 1, 10 L. Ed. 2d 148, 83 S. Ct. 1068 (1963) 13

Scaife Co. v. Commissioner, 314 U. S. 459, 86 L. Ed. 339, 62 S. Ct. 338 (1941) 10

Schiavone v. Fortune, 477 U. S. 21, 91 L. Ed. 2d 18, 106 S. Ct. 2379 (1986) 9, 10

Tyler v. Cain, 533 U. S. 656, 150 L. Ed. 2d 632, 121 S. Ct. 2478 (2001) 12

United States v. Duffus, 174 F. 3d 333 (CA3 1999) 20

Williams v. Taylor, 529 U. S. 420, 146 L. Ed. 2d 435, 120 S. Ct. 1479 (2000) 11, 16

United States Statutes

28 U. S. C. § 2242 ..... 8, 19, 21

28 U. S. C. § 2244(b)(2)(A) 12

28 U. S. C. § 2244(b)(2)(B) 12

28 U. S. C. § 2244(d)(1) 2, 7, 16

28 U. S. C. § 2254(a) 10

Rules of Court

Federal Rule of Civil Procedure 1 18

Federal Rule of Civil Procedure 8(f) 19

Federal Rule of Civil Procedure 15(a) 15

Federal Rule of Civil Procedure 15(c)(2) 8, 14

Federal Rule of Civil Procedure 61 19

Rules Governing Section 2254 Cases in the United States District Court, Rule 2(d) 15

Rules Governing Section 2254 Cases in the United States District Court, Former Rule 9(a) 16

Rules Governing Section 2254 Cases in the United States District Court, Rule 11 21

Treatises

3 J. Moore, D. Coquillette, G. Joseph, S. Schreiber, J. Solovy, & G. Vario, Moore's Federal Practice (3d ed. 2003) 15

6A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure (2d ed. 1990) 14

H. Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U. Chi. L. Rev. 142 (1970) ... 12

Miscellaneous

Judicial Conference of the United States, Ad Hoc Committee on Federal Habeas Corpus in Capital Cases, Committee Report and Proposal (Aug. 23, 1989) 11

P. Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 Harv. L. Rev. 441 (1963) 12, 13

IN THE

Supreme Court of the United States

DENEICE A. MAYLE, Warden,

Petitioner,

vs.

JACOBY LEE FELIX,

Respondent.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

CJLF has appeared as *amicus curiae* in this Court in many cases implementing the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). We have sought to have this

---

1. This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

   Both parties have given written consent to the filing of this brief.

Act implemented and enforced as Congress intended, opposing the numerous attempts to evade and sabotage it.

This case addresses yet another evasion of the AEDPA. The AEDPA's statute of limitations for habeas, see 28 U. S. C. § 2244(d)(1), is an integral part of Congress's reform of habeas corpus. By ensuring a definite and relatively quick starting point for habeas litigation, the statute of limitations helps to preserve the finality of convictions by speeding the pace of litigation. The Ninth Circuit's decision to effectively allow the unlimited relation back of untimely amendments hamstrings this reform, by allowing unnecessary delay through the dilatory amendment of habeas petitions. This assault of the finality of convictions is contrary to the interests that CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

On September 21, 1993, at about 11:00 p.m., Lawrence Gallow and his girlfriend Paula were driving in Sacramento, California, when the car ran out of gas near the corner of Eighth Avenue and San Jose Way. *People* v. *Lawson*, No. C021597 (Cal. App. Feb. 25, 1997), p. 2; App. to Pet. for Cert. E-2. Gallow asked a man across the street, Richard Harper, to give them a ride to a gas station. See *ibid.* Harper agreed to give them a lift. See *ibid.*

As the three approached Harper's car, an armed man who wore a red rag over his face and a hood over his head ordered them "to 'give up the car.' " *Id.*, at 3. The three fled on foot. See *ibid.* Gallow took cover behind his own car where he saw two more similarly dressed men approach. See *ibid.* One had a handgun and approached Harper's car while the other had a "big military-style weapon" and went to the middle of the intersection. *Ibid.* Gallow ran and was chased by the man with the large weapon. His pursuer fired at least one shot at him, but Gallow ultimately found his way home to safety. See *ibid.*

Harper was not so lucky. The other gunmen pursued him and shot at him several times. See *ibid.* "He was found dead in a field not far from his car, with a bullet in the back of his head." *Id.*, at 3-4. After Harper's murder, two of the robbers took Harper's car and drove away with the headlights off. See *id.*, at 4. Later that night, Harper's car showed up at Felix's house and was followed by Felix's vehicle five to ten minutes later. See *ibid.* Three or four men got out of Felix's vehicle and talked, while the passenger door of Harper's car stayed open. See *ibid.* The police discovered Harper's car at the same location the next day. See *ibid.* A palmprint and fingerprint of Mario Lawson, Felix's codefendant in state court, was found in the back of Harper's vehicle. See *ibid.*

One month later, Nathan Potts, who was under arrest for armed robbery, negotiated a deal with the police to provide information about the Harper murder in return for no prison time. See *ibid.* Potts lived above Lawson, who was his good friend and also knew Felix. See *id.*, at 4-5. Potts stated that one morning just after the murder he went outside to see Lawson and Felix installing stereo equipment into Felix's car. *Id.*, at 5. In a conversation about the murder, Lawson admitted his involvement in the crime, while Felix stated that a woman might have noticed him and that "he was 'going back to smoke [shoot] her.' " *Ibid.* Later, a distraught Felix told Potts that others were trying to implicate him and that he had an alibi for the police. *Ibid.*

When interviewed by the police, Felix and Lawson gave false and contradictory statements about their activities on the night of the murder. The prosecution's case centered on a police interview given by Kenneth Williams. *Id.*, at 6. Williams was crying at the beginning of the videotaped interview because he did not want to snitch on his friends. See *ibid.* Williams stated that he overheard Felix, Lawson, and a third man, Curtis, plan to rob Harper for some marijuana. See *id.*, at 6-7. Curtis had a .38 revolver while Felix had an automatic weapon. *Id.*, at 7. Williams then saw the three "go around the

corner and about two minutes later six or seven shots rang out." *Ibid.* He then saw Curtis and Felix drive away in Harper's car. *Ibid.* Later, as he saw the three going through Harper's car, Felix admitted that he believed he had shot Harper. See *ibid.* Williams denied remembering the interview at trial even after being shown excerpts of the videotape. See *ibid.*

At trial, counsel objected to the use of Felix's statement on Fifth Amendment grounds and William's statement on Sixth Amendment grounds. See Opp. 2. Felix's statements were used to impeach his testimony. *Ibid.*, n. 2. Felix was convicted of first-degree murder and second-degree robbery in 1995. See *Felix* v. *Mayle*, 379 F. 3d 612, 614 (CA9 2004). The jury also found the special circumstance that the murder was committed during the course of a robbery, and Felix was sentenced to life without parole. Pet. for Cert. 3. On his direct appeal, he contended that the use of videotaped statements of a key prosecution witness violated the Sixth Amendment's Confrontation Clause. See *People* v. *Lawson*, *supra*, at 10-13.[2] He also raised a state-law instructional issue concerning Williams' testimony, see *id.*, at 8, challenged the jury's findings that he was a " 'major participant' " in the robbery and murder, a requirement for the "special circumstance" finding. See *id.*, at 13-16. He also challenged the constitutionality of his reasonable doubt instruction. See *id.*, at 16. He did not raise his Fifth Amendment claim on appeal. The California Court of Appeal rejected his claims and affirmed the conviction. *Id.*, at 17. The California Supreme Court subsequently denied Felix's petition for review on May 14, 1997. See *People* v. *Lawson*, No. S060031, California Supreme Court Minutes, p. 747 (May 14, 1997). His conviction became final on August 12, 1997, when his time to file a certiorari petition expired.

---

2. *People* v. *Green*, 3 Cal. 3d 981, 479 P. 2d 998 (1971), discussed by the state court, is based purely on the federal Confrontation Clause, not state grounds.

Felix filed a *pro se* federal habeas corpus petition on May 8, 1998. See *Felix*, 379 F. 3d, at 614. This petition raised the same arguments that were made on his direct appeal. See *ibid.* The District Court appointed the Federal Defender as counsel for Felix on May 29, 1998. See Pet. for Cert. 3. The AEDPA's one-year statute of limitation expired on August 11, 1998. See 379 F. 3d, at 614. Through counsel, Felix filed an amended petition that added a new claim, that the Fifth Amendment self-incrimination privilege and due process were violated by the admission of incriminating statements made by Felix during a police interview. See *ibid.* The amended claim was filed on January 28, 1999, after the expiration of the statute of limitations. *Ibid.*

The District Court rejected the Fifth Amendment claim as time barred under the AEDPA. See *ibid.* It accepted the magistrate's recommendation that the new claim did not relate back under Federal Rule of Civil Procedure 15(c)(2) because it did not arise "from 'the same core of facts' " as the Sixth Amendment claim. *Ibid.* The District Court issued a certificate of appealability for the Fifth and Sixth Amendment claims. See *id.*, at 614-615.

The Ninth Circuit panel rejected the District Court's statute of limitation analysis. See *id.*, at 617. It held that under Rule 15(c)(2) "the proper 'conduct, transaction, or occurrence' in a habeas context is the trial and conviction under attack." *Id.*, at 615. This followed the reasoning of a Seventh Circuit opinion, while disagreeing with the Third, Fourth, Eighth, Eleventh and D.C. Circuits. See *id.*, at 615-616. Since Felix's Fifth Amendment claim attacked the legality of his trial, the Ninth Circuit held that it related back to his Sixth Amendment claim. See *id.*, at 617. The Court of Appeals remanded the confession claim to the District Court, see *ibid.*, and denied the Confrontation Clause claim on the merits. See *id.*, at 617-618.

This Court granted certiorari on January 7, 2005.

SUMMARY OF ARGUMENT

Federal Rule of Civil Procedure 15(c)(2) should be interpreted in harmony with the unique challenges of habeas corpus. Before interpreting Rule 15(c)(2) in habeas cases, it is important to understand how the rule works in civil cases. Civil statutes of limitation are meant to give parties fair notice of adverse claims against them. A party typically does not begin its defense against a claim until receiving notice of the claim when the action is filed. Civil statutes of limitation protect parties from trial by ambush by preventing the revival of stale claims. While important to fairness, civil statutes of limitation can seem harsh or even arbitrary. Rule 15(c)(2) ameliorates some of this by allowing relation back where the adverse party's notification interest is not prejudiced.

The habeas statute of limitation protects a different interest. Finality is a linchpin of the AEDPA and the habeas statute of limitation. The lack of finality in the old habeas system was a major source of criticism and inspired the habeas statute of limitation in the Powell Committee's proposals. Since federal habeas necessarily involves the litigation of previously litigated issues, the habeas statute of limitation does not center on notice. The relationship between Rule 15(c)(2) and the habeas statute of limitation must instead center on finality.

The Ninth Circuit's interpretation of Rule 15(c)(2) hamstrings the habeas statute of limitation. Defining the entire trial and conviction as one transaction effectively allows for the unlimited relation back of amendments, as any new claim will come within the statutory language of Rule 15(c)(2). This is not what Congress intended when it enacted a statute of limitation for habeas. While the federal courts had the power to deny dilatory amendments under the old regime, Congress was dissatisfied with the pace of habeas litigation. The AEDPA and its statute of limitation is Congress's response to this problem, by funneling claims into a single habeas petition with a definitive starting and ending point. The statute of limitation does not merely give courts the power to deny

untimely amendments, it gives them the duty to do so. The Ninth Circuit's ruling allows courts to avoid this duty by giving it the power to allow the unlimited amendment of claims. This hamstrings the finality interest that the habeas statute of limitation protects, and should be rejected.

Other circuit courts have found a better approach to Rule 15(c)(2) in habeas actions. They only allow an amended claim to relate back if the claim comes from the same core set of facts as a timely filed claim. The Ninth Circuit rejected this approach, asserting this reading would render Rule 15(c)(2) a virtual nullity in habeas cases. This is incorrect. It is possible for a set of facts to support more than one constitutional ground for attacking the conviction. For example, a custodial interrogation can support both a *Miranda* and a *Massiah* claim. An amendment with a *Massiah* claim would relate back to a timely *Miranda* claim arising from the same interrogation under this rule.

Congress's intent to preserve finality through the habeas statute of limitation should take precedence over a broad application for Rule 15(c)(2). The narrower rule preserves finality by restricting relation back while allowing some measure of relation back where the core facts are already being litigated. Nothing more is necessary. The petitioner has already had the opportunity to litigate his claims in state court. If he cannot file one within the one-year statute of limitation, then there is no compelling need to relitigate this claim.

ARGUMENT

I. Federal Rule of Civil Procedure 15(c)(2) should be interpreted in harmony with the unique challenges of federal habeas corpus.

This case addresses how much meaning is to be given to the AEDPA's one-year statute of limitation for filing federal habeas corpus claims. See 28 U. S. C. § 2244(d)(1). As the

dissent below notes, the majority's ruling "obliterates AEDPA's one year statute of limitation." *Felix* v. *Mayle*, 379 F. 3d 612, 619 (CA9 2004) (Tallman, J., concurring and dissenting). Defining "conduct, transaction, or occurrence," see Fed. Rule Civ. Proc. 15(c)(2), to be the entire trial and conviction makes it too easy for a habeas petitioner to string out the proceedings through repeated amendment of the original habeas petition. See Part II-B. This case will decide whether this important part of the AEDPA will be effective.

The Ninth Circuit is joined by the Seventh Circuit in its expansive reading of Rule 15(c)(2). See *Ellzey* v. *United States*, 324 F. 3d 521, 526 (CA7 2003). These decisions fail to place the rule in its proper context. Although Congress declared that habeas petitions may be "amended or supplemented as provided in" the federal rules of civil procedure, see 28 U. S. C. § 2242, this is not a license to override the reforms of the AEDPA.

The rules of civil procedure may provide the framework for amending and supplementing habeas petitions, but they should be interpreted in the singular context of habeas corpus litigation. While habeas is sometimes labeled a civil proceeding, see, *e.g.*, *Fisher* v. *Baker*, 203 U. S. 174, 181 (1906), this is "gross and inexact. Essentially, the proceeding is unique." *Harris* v. *Nelson*, 394 U. S. 286, 293-294 (1969) (footnote omitted); see also *Allen* v. *McCurry*, 449 U. S. 90, 98, n. 12 (1980) ("unique purpose of habeas corpus"); *Rose* v. *Mitchell*, 443 U. S. 545, 583 (1979) (Powell, J., concurring) ("habeas corpus is a unique remedy"). Therefore habeas practice "has conformed with civil practice in only a general sense." *Harris*, *supra*, at 294. Interpretation of Rule 15(c)(2) and the AEDPA's statute of limitation must be made in the context of habeas corpus's unique challenges and the purpose of the AEDPA.

In order to understand why Rule 15(c)(2) should apply differently to habeas corpus, it is useful to first examine statutes of limitation and the amendment process in ordinary civil litigation.

> "Statutes of limitation, like the equitable doctrine of laches, in their conclusive effects are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them." *Railroad Telegraphers* v. *Railway Express Agency, Inc.*, 321 U. S. 342, 348-349 (1944).

While there is tension between the mechanical rules of statutes of limitation and federal equity principles, see *Holmberg* v. *Armbrecht*, 327 U. S. 392, 396 (1946), civil limitations of actions are motivated by a sense of fairness. Civil statutes of limitation primarily prevent trial by surprise. See *American Pipe & Constr. Co.* v. *Utah*, 414 U. S. 538, 561 (1974) (Blackmun, J., concurring) (citing *Railroad Telegraphers*, *supra*). This reflects the nature of civil proceedings. The civil defendant usually does not know that he or she will litigate an issue until the filing of the complaint and the service of process. Since the defense cannot start until the defendant is notified that there will be litigation, requiring plaintiffs to file actions within a reasonable time preserves the civil defendant's right to a fair opportunity to mount a defense. Civil statutes of limitation therefore center on notice. See *Crown, Cork & Seal Co.* v. *Parker*, 462 U. S. 345, 352 (1983).

Civil applications of Rule 15(c)(2) are guided by the same principle. "The rationale of Rule 15(c) is that a party who has been notified of litigation concerning a particular occurrence has been given all the notice that statutes of limitation were intended to provide." *Baldwin County Welcome Center* v. *Brown*, 466 U. S. 147, 150, n. 3 (1984). Therefore an amendment will not relate back if there is insufficient notice to the adverse party. See *Schiavone* v. *Fortune*, 477 U. S. 21, 29 (1986).

Rule 15(c)(2) is remedial in civil cases. A civil statute of limitation prevents a claim from ever being litigated, even if it is valid. Since a statute of limitation requires a set time limit, there is always a degree of arbitrariness in how it operates. See *Johnson* v. *Railway Express Agency, Inc.*, 421 U. S. 454, 463 (1975). Using a necessarily arbitrary time limit to squelch unlitigated claims can seem harsh at times. See *Scaife Co.* v. *Commissioner*, 314 U. S. 459, 463 (1941). By allowing relation back when there is no prejudice to the adverse party, see *Schiavone*, 477 U. S., at 28, Rule 15(c)(2) lessens the harshness and arbitrariness of civil statutes of limitation without harming the adverse party's interest in having fair notice of the claim.

Federal habeas corpus provides a much different context for its statute of limitation and Rule 15(c)(2). Habeas corpus litigates litigation, *i.e.*, the underlying conviction or sentence. The ultimate issue in habeas, the legality of the state's custody over the petitioner, see 28 U. S. C. § 2254(a), was already successfully litigated by the government at the petitioner's trial and direct review. The doctrines of exhaustion and procedural default generally ensure that claims are first litigated in state court before being raised on habeas corpus.[3] See *O'Sullivan* v. *Boerckel*, 526 U. S. 838, 853 (1999) (Stevens, J., dissenting); *Edwards* v. *Carpenter*, 529 U. S. 446, 452-453 (2000). The habeas statute of limitation differs from its civil counterpart because it prevents the relitigation of claims rather than their initial litigation.

---

3. Felix's Fifth Amendment claim was raised at trial, but not on his direct appeal. See *supra*, at 4. Hence, it is procedurally defaulted. See *In re Dixon*, 41 Cal. 2d 756, 759, 264 P. 2d 513, 514 (1953). However, Ninth Circuit precedent has effectively nullified the appellate procedural default rule through radical expansions of the adequacy and independence requirements. See, *e.g.*, *Park* v. *California*, 202 F. 3d 1146, 1153 (CA9 2000). *Amicus* CJLF has previously explained why this line of cases is erroneous, see Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in *California* v. *Park*, No. 99-1971, but to date this Court has not granted certiorari on the issue.

The collateral nature of habeas also changes the interests protected by the statute of limitation. While the legislative history of the AEDPA's statute of limitation is minimal, its purpose can be deduced from other sources. The recommendations of the Powell Committee on reforming federal habeas in capital cases, see Judicial Conference of the United States, Ad Hoc Committee on Federal Habeas Corpus in Capital Cases, Committee Report and Proposal (Aug. 23, 1989) ("Powell Committee"), reprinted in 135 Cong. Rec. 24,694 (1989), was a major influence of the AEDPA. See *Lindh* v. *Murphy*, 521 U. S. 320, 340-341, n. 2 (1997) (Rehnquist, C. J., dissenting). A 180-day statute of limitation for federal habeas in capital cases was an important component of their proposed reforms. See Powell Committee, *supra*, at 18. The committee's proposal was motivated by what it saw as a serious problem with the use of federal habeas corpus to delay the execution of the sentence in capital cases. See *id.*, at 5. It sought a system where the habeas petitioner in capital cases had "one complete and fair course of collateral review in the state and federal system . . . ." *Id.*, at 6. Once "this review has concluded, litigation should end." *Ibid.*

A statute of limitation for habeas was essential to this goal. It was designed to minimize the substantial incentives that capital prisoners have to use habeas corpus as a tool for delay. See *id.*, at 19. The statute of limitation "serves the state interests in prompting finality in capital cases." *Ibid.* Although it operates like a statute of limitation, the Powell Committee compared the time limit to "the time provided for appeals in the state and federal systems, or for seeking certiorari review in the Supreme Court." *Id.*, at 6.

While the AEDPA takes a different form than the Powell Committee proposal, it advances similar goals. The AEDPA is intended "to further the principles of comity, finality, and federalism." *Williams* v. *Taylor*, 529 U. S. 420, 436 (2000). Like the Powell Committee proposal, the AEDPA is meant to allow the prisoner only one review of the conviction and

sentence on federal habeas corpus. A successive petition must either satisfy the high standard for applying a new rule retroactively on habeas corpus, see 28 U. S. C. § 2244(b)(2)(A); *Tyler* v. *Cain*, 533 U. S. 656, 665 (2001), or good cause plus a strong showing of actual innocence. See 28 U. S. C. §§ 2244(b)(2)(B)(i)-(ii). The exhaustion requirement, see *supra*, at 10, further ensures that all claims are presented at once. These provisions funnel all claims towards a single habeas proceeding, in order to minimize habeas' damage to the finality of convictions.

Finality is one of the major problems of federal habeas corpus. The most compelling criticisms of this Court's expansion of habeas corpus emphasized the considerable harm that comes from the endless relitigation of convictions on federal habeas. For example, any factual issue related to the collateral attack is less reliably determined the longer the wait from the trial and conviction. See H. Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U. Chi. L. Rev. 142, 147 (1970). Delays in habeas litigation can also make retrial impossible as time erodes memories and evidence. See *ibid.*

Finality is essential to an effective criminal law. See P. Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 Harv. L. Rev. 441, 452 (1963). Continuous relitigation of convictions "implies a lack of confidence about the possibilities of justice that cannot but war with the underlying substantive commands." *Ibid.* The free reopening of state criminal judgments only lessens respect for the decisions of the criminal courts. See Friendly, 38 U. Chi. L. Rev., at 149. Diminishing finality also wastes scarce judicial, investigative, and attorney resources on relitigating criminal convictions. See *id.*, at 148; Bator, *supra*, at 451. The resources wasted by relitigation on habeas are not merely economic, but also "intellectual, moral, and political . . . ." Bator, *supra*, at 451. A lack of finality necessarily limits the conscientiousness of the trial judge as habeas devolves into

"second-guessing merely for the sake of second-guessing." *Ibid.*

Attacks on finality also compromise the rehabilitation of prisoners. Rehabilitation begins with the criminal accepting society's judgment. Habeas delays that acceptance, making rehabilitation more difficult. See *id.*, at 452. Society needs repose for an effective criminal justice system. See *ibid.* At a certain point, proceedings must end.

> "Both the individual criminal defendant and society have an interest in insuring that there will at some point be the certainty that comes with an end to litigation, and that attention will ultimately be focused not on whether a conviction was free from error but rather on whether the prisoner can be restored to a useful place in the community."

Sanders v. *United States*, 373 U. S. 1, 24-25 (1963) (Harlan, J., dissenting).

This is what the habeas statute of limitation is intended to limit. If finality requires that proceedings must end at some point, then it also requires that the habeas proceedings have a definitive starting point. Something cannot end until it has first started, and the statute of limitation establishes a definitive, relatively early start for habeas proceedings. Analysis of Rule 15(c)(2) as applied to habeas should be made in this context. The special problems of habeas and the important role that the statute of limitation plays in addressing them are essential to understanding how the Ninth and Seventh Circuits have improperly expanded Rule 15(c)(2) in habeas cases.

II. The Ninth Circuit's decision to allow unlimited amendment of habeas petitions under Rule 15(c)(2) is incompatible with the AEDPA.

The problem with the approach of the Ninth Circuit to Rule 15(c)(2) in habeas corpus is that it allows effectively unlimited

amendments to federal habeas petitions. A right to unlimited amendment substantially diminishes the finality interests advanced by § 2244(d)(1)'s statute of limitation. Given the importance of finality, and the AEDPA's protection of that interest, this broad right to amendment is improper.

A. Unlimited Amendment.

Federal Rule of Civil Procedure 15(c)(2) allows an amendment to relate back to the initial filing when the new claim arises from the same "conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading." In civil cases, this is not a right to unlimited relation back. Different transactions like "the separate publication of a libelous statement, the breach of an independent contract [or] the infringement of a different patent" may not relate back under Rule 15(c). See 6A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 1497, pp. 73-74 (2d ed. 1990) (footnote omitted). Relation back is acceptable for amendments that make technical corrections in the original pleadings. See *id.*, at 74. The key issue in close cases is whether the new action is so different, "that it cannot be said that defendant was given adequate notice of the conduct, transaction, or occurrence that forms the basis of the claim or defense . . . ." *Id.*, at 79 (footnotes omitted). This follows from the purpose behind the civil statute of limitation, giving notice to the adverse party so that it may be able to respond to the claim. See *supra*, at 9. Like the analysis of "compulsory counterclaims, cross-claims, and certain third party claims," courts look "for a common core of operative facts in the two pleadings." *Id.*, at 85 (footnotes omitted). Ultimately, "a failure of notice will prevent relation back." *Id.*, at 86-88.

The Ninth Circuit chose to apply this system to habeas petitions in the broadest manner possible. It held that the relevant transaction for Rule 15(c)(2) is the "trial and conviction under attack," *Felix* v. *Mayle*, 379 F. 3d 612, 615 (CA9 2004), thus effectively allowing unlimited relation back of

amendments to habeas petitions.[4] Under the Ninth Circuit's analysis, once it is determined that the claim in the amendment is part of the same transaction, the notice requirement is satisfied. See *id.*, at 617. A collateral attack on a conviction in federal habeas necessarily questions the validity of the trial or sentence. Felix "is challenging the usual subject of a habeas petition—the custody that results from his conviction and trial." *Id.*, at 616. Therefore, in the Court of Appeals' view, any claim that can be raised in a habeas petition attacking the conviction or sentence necessarily relates back under Rule 15(c)(2).

It is true that rules of civil procedure allow courts to deny amendments due to "undue delay, bad faith or dilatory motive . . . ." *Foman* v. *Davis*, 371 U. S. 178, 182 (1962). This finding can be difficult to make since it often requires an inquiry into the motives of counsel and the petitioner, and because of a strong preference for amendment under the rules of civil procedure. In civil actions there is an "extremely liberal" policy of allowing amendments. 3 J. Moore, D. Coquillette, G. Joseph, S. Schreiber, J. Solovy, & G. Vario, Moore's Federal Practice § 15.14[a], pp. 15-27 to 15-28 (3d ed. 2003); Fed. Rule Civ. Proc. 15(a) ("leave shall be given freely when justice so requires"). This policy necessarily limits the ability of courts to deny leave to amend. See Moore's Federal Practice § 15.14[a], at 15-28. For example, before AEDPA the Third Circuit held that it was an abuse of discretion to deny an additional six months to amend, when petitioner had already been allowed over five months since his original filing. See *Riley* v. *Taylor*, 62 F. 3d 86, 88-89 (1995).

The AEDPA was enacted because Congress was dissatisfied with the status quo in habeas corpus and believed reform was necessary in order to protect "comity, finality, and federal-

---

4. Section 2254 petitions are always directed to judgments of a single court, see Rule 2(d) of the Rules Governing Section 2254 Cases in the United States District Courts, and rarely involve more than one judgment.

ism." *Williams* v. *Taylor*, 529 U. S. 420, 436 (2000). Drawing on the Powell Committee's analysis of the delay inherent in the old habeas system, Congress enacted the AEDPA with a vigorous statute of limitation. This provision does not merely give the courts the power to dismiss dilatory amendments, because the federal courts already had that power. Former Habeas Rule 9 allowed district courts to dismiss initial habeas petitions for dilatory filing where the delay prejudice the state's case. See Rule 9(a) of the Rules Governing Section 2254 Cases in the United States District Courts ("Habeas Rules"), 28 U. S. C. foll. § 2254, at 476 (2000 ed.). Rule 9 did not give the courts the power to dismiss dilatory petitions absent a finding of prejudice. See *Lonchar* v. *Thomas*, 517 U. S. 314, 326-327 (1996). While this Court noted, the "considerable debate about whether the present Rule properly balances the relevant competing interests" that debate had to be resolved by Congress or the rulemaking process. *Id.*, at 328. With § 2244(d)(1), Congress resolved that debate by creating an obligation on the federal courts to dismiss late habeas claims without a showing of prejudice. It demonstrates Congress's dissatisfaction with how the federal courts had handled dilatory petitions and replaced a very permissive regime with a much stricter procedure. The proper interpretation of Rule 15(c)(2) leaves the strict time limit intact.

In his opposition to certiorari, Felix claimed that the Ninth Circuit's rule is more nuanced than this. He asserts that since he does not attack the constitutionality of his sentence, whether the trial, conviction, and sentence are all part of a single transaction under Rule 15(c)(2) is not presented in this case. See Opp., at 6. He indicates that his claim could relate back under a narrower standard because "both claims arise out of a discrete step in the litigation process—his trial, and attack the same actor—the state trial judge who admitted the unconstitutional statements into evidence." *Ibid.*

This argument claims more that it can prove. While Felix is not attacking his sentence, the Ninth Circuit viewed the entire

"trial and conviction" as one transaction under Rule 15(c)(2). See *Felix*, 379 F. 3d, at 615. Also, the Ninth Circuit did not distinguish a case that made a distinction between trial and sentence claims, but instead chose to disagree with it. See *id.*, at 615-616 (citing *Davenport* v. *United States*, 217 F. 3d 1341, 1344-1345 (CA11 2000) (ineffective assistance at sentencing claim does not relate back to an ineffective assistance at trial claim)).

Also this proposed synthesis of the Ninth Circuit's holding seems arbitrary. Felix gives no good reason why the admission of evidence should be distinguished as a transaction from the trial as a whole, other than avoiding review of this case. Since the Ninth Circuit's rule is based on notice, see *Felix*, 379 F. 3d, at 616-617, there would be no logical limit to a petitioner's ability to have an otherwise valid, but time-barred, claim relate back. Under the Ninth Circuit's holding, the state has no notice interest that can be protected through the statute of limitation. As it has already litigated the legality of its custody over the petitioner, and because the habeas petition attacks the legality of that custody, the state necessarily has notice that the legality of the trial and conviction will be attacked.

Habeas procedure makes it highly likely that the state will also have actual notice of any specific claim that the petitioner may be able to raise in an amended petition. The doctrines of exhaustion and procedural default, when properly enforced, prevent claims from reaching a federal habeas court that have not yet been raised in state court. See *supra*, at 10. As a general rule, the state will have already litigated in state court any claim made in the amended petition.[5]

This does not mean that the Ninth Circuit was correct. By limiting Rule 15(c)(2) to notice, it rendered the habeas statute

---

5. As noted *supra*, note 3, the Ninth Circuit has effectively nullified the appellate default rule. However, the requirement of objection at trial remains in force. See *Bonin* v. *California*, 59 F. 3d 815, 842-843 (CA9 1995).

of limitation irrelevant by focusing on the wrong objective. The habeas statute of limitation protects the finality of convictions rather than notice. See Part I, *supra*. The relevant question in this case is the effect that the liberal relation back allowed by the Ninth Circuit has on the finality interests protected by the AEDPA. Had the Ninth Circuit addressed this issue, it would have reached a different conclusion.

B. Unlimited Amendment and Finality.

The Ninth Circuit's decision to allow unlimited relation back of amended claims under Rule 15(c)(2) hamstrings the interests in finality that the habeas statute of limitation is intended to protect. If upheld, the Ninth Circuit's decision makes it far too easy for a prisoner to circumvent the statute of limitation and delay proceedings through the use of amendments. This type of abuse happened before the AEDPA and was a major reason that Congress passed the habeas limits of the AEDPA.

Amending a habeas petition to introduce a new claim will often delay the resolution of the case. If the claim is not trivial or clearly improper to consider under procedural default or exhaustion, then the state will have to research and write a reply, and the court will have another issue to consider. If supplemental factfinding is required, then there can be further delay for discovery and an evidentiary hearing. Where the amendment involves a legal theory not previously litigated or appeal or habeas, as happened in this case, further research, writing, and argument is all but certain. If the argument had not previously been addressed in state court, then it may also be necessary to address procedural default or exhaustion.

There is a fundamental difference between habeas procedure under the AEDPA and civil procedure under the Federal Rules of Civil Procedure. The civil procedure rules are meant to resolve the cases on their merits rather than on the pleadings. They require a "just, speedy, and inexpensive determination of every action." See Fed. Rule Civ. Proc. 1. Similarly, Rule 8(f)

requires pleadings to be construed to do "substantial justice," Fed. Rule Civ. Proc. 8(f), and Rule 61 states that courts should ignore errors that do not effect the substantive rights of the parties. See Fed. Rule Civ. Proc. 61.

Rather than encouraging decisions on the merits, the AEDPA places substantial limits on habeas corpus when it is used as a collateral attack on a criminal judgment. State court is the primary forum for deciding the merits. Federal habeas is "secondary and limited," *Barefoot* v. *Estelle*, 463 U. S. 880, 887 (1983), for the purpose of correcting "extreme malfunctions" of the state court system. *Jackson* v. *Virginia*, 443 U. S. 307, 332, n. 5 (1979) (Stevens, J., concurring in the judgment). The habeas statute of limitation does not protect litigants from being surprised by stale claims, but instead preserves the finality of convictions by encouraging the speedy resolution of federal habeas petitions. See *supra*, at 11-13. While not as severe as common law pleading, habeas under the AEDPA is removed from the relative liberality of the civil rules. Although the AEDPA did not change the law making the rules of civil procedure govern amendments to habeas petitions, see 28 U. S. C. § 2242, this law and Rule 15(c)(2) now operate in the very different world of the AEDPA.

The inevitable diminishment of finality resulting from the Ninth Circuit's right to unlimited amendment subverts the statute of limitation. Under this ruling there will be no definite beginning for habeas actions, and their end is susceptible to considerable delay. This result is potentially crippling to the finality of many convictions and is thus contrary to the intent of Congress. Fidelity to the AEDPA requires a different interpretation of Rule 15(c)(2).

III. In habeas actions, the relevant "conduct, transaction, or occurrence" for relating back an amended petition under Rule 15(c)(2) must at least come from the same core set of facts as a timely filed claim.

Other circuits have adopted a much narrower definition of "conduct transaction, or occurrence," than the Ninth Circuit. Rather than viewing the whole trial as a single transaction under Rule 15(c)(2), other circuits typically require that "in order to relate back, the untimely claim must have arisen from 'the same set of facts' as the timely filed claim, not from separate conduct or a separate occurrence in 'both time and type.' " *Davenport* v. *United States*, 217 F. 3d 1341, 1344 (CA11 2000) (quoting *United States* v. *Pittman*, 209 F. 3d 314, 318 (CA4 2000)) ("both time and type"); *United States* v. *Duffus*, 174 F. 3d 333, 337 (CA3 1999) ("same set of facts"). This is the better definition of Rule 15(c)(2). It protects the AEDPA's statute of limitation while retaining fidelity to the text of Rule 15(c)(2).

The Ninth Circuit supports its ruling by asserting that a narrower claim-based definition would render Rule 15(c)(2) "virtually meaningless in a habeas context." *Felix* v. *Mayle*, 379 F. 3d 612, 615 (CA9 2004). This overstates the effect of a narrower interpretation of Rule 15(c)(2) and reflects misplaced priorities. While the alternative interpretation of Rule 15(c)(2) is narrower than the Ninth Circuit's, it does not completely foreclose relation back in habeas litigation. It is possible for one core set of facts to support more than one legal ground for attacking the conviction. For example, a post-indictment interrogation of the suspect can raise issues regarding the admissibility of any statements made during the questioning under the Sixth Amendment right to counsel, see *Massiah* v. *United States*, 377 U. S. 201 (1964) and the Fifth Amendment self-incrimination privilege, see *Miranda* v. *Arizona*, 384 U. S. 436 (1966). Since it is entirely possible for a court to miss one of these two issues when analyzing a case, see *Fellers* v. *United States*, 540 U. S. 519, 525 (2004), a

habeas petitioner could miss one of these claims in the first petition. The narrower, fact-based interpretation of Rule 15(c)(2) would still allow relation back in such a case. For example, if the *Miranda* claim was filed within the statute of limitation, a later *Massiah* claim arising from the same interrogation as the *Miranda* claim would relate back to the original claim under Rule 15(c)(2).

The Ninth Circuit has made an even more fundamental error. The focus of the analysis should not be on trying to breathe life into Rule 15(c)(2), a rule written for civil litigation without habeas in mind. See *Harris* v. *Nelson*, 394 U. S. 286, 294 (1969). Instead, Rule 15(c)(2) cannot be allowed to frustrate the intent behind the AEDPA and its statute of limitation. The statute of limitation is an integral part of a comprehensive reform of habeas corpus. In any conflict between the two, the purpose of the specific habeas statute should prevail over the purpose of the general civil rule. See *Harris*, *supra*, at 296 (civil rules inapplicable to habeas when "ill-suited"); Rule 11 of the Rules Governing Section 2254 Cases in the United States District Courts.

It is true that Congress allows the civil rules to govern amendment in habeas actions. See 28 U. S. C. §2242. Enactments are not interpreted "in isolation, but in the context of the *corpus juris* of which they are a part, including later-enacted statutes." *Branch* v. *Smith*, 538 U. S. 254, 281 (2003) (plurality opinion). This is not an argument for the extraordinary measure of repeal by implication. See *Radzanower* v. *Touche Ross & Co.*, 426 U. S. 148, 155 (1976). Rule 15(c)(2) will continue to have an effect in habeas actions. Its low profile simply reflects the differences between habeas and ordinary civil litigation and the intent of the AEDPA.

Civil statutes of limitation prevent claimants from ever litigating their claim. In this situation, a relatively liberal Rule 15(c)(2) is understandable. See *supra*, at 10. As noted earlier, habeas and its relitigation of claims is a very different proceeding with substantially different interests. See *supra*, at 10.

These differences support a comparatively restrictive reading of Rule 15(c)(2) in the context of habeas corpus. The fact-based rule adopted by the other circuits allows for some relation back, while protecting the AEDPA's statute of limitation from the finality-compromising free amendment regime imposed by the Ninth Circuit.

Felix's amended petition cannot relate back under these principles. His Fifth Amendment claim is based upon police interrogation of himself that is factually distinct from his Confrontation Clause claim which is based upon the admission of the videotaped interview of Williams. See *supra*, at 3-4. This result is neither unfair nor contrary to the intent of Congress. Felix had ample opportunity to litigate his Fifth Amendment claim in the California courts, and he could have included it in his first federal habeas petition. Even if he lacked the expertise to recognize the Fifth Amendment claim, appointed counsel had almost two and one-half months to file the Fifth Amendment claim before the statute of limitation ran. See Pet. for Cert. 3. Felix had his chance, and he lost it. Finality and fairness require no less than dismissing the *Miranda* claim.

CONCLUSION

The decision of the United States Court of Appeals for the Ninth Circuit should be reversed.

February, 2005

Respectfully submitted,

CHARLES L. HOBSON

Attorney for Amicus Curiae
Criminal Justice Legal Foundation

No. 04-563

IN THE

Supreme Court of the United States

DERRICK A. MAYLE, WARDEN,

Petitioner,

v.

JACOBY LEE FELIX,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* PROFESSORS ARTHUR R. MILLER, JOHN B. OAKLEY, KEVIN M. CLERMONT, SHERI J. ENGELKEN, TYLER T. OCHOA, LAUREN ROBEL, MICHAEL E. SOLIMINE, JEFFREY STEMPEL, AND GEORGENE M. VAIRO IN SUPPORT OF RESPONDENT

CARTER G. PHILLIPS*
JEFFREY T. GREEN
ERIC A. SHUMSKY
BRIAN M. PALMER
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Counsel for Amici Curiae

* Counsel of Record

March 22, 2005

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTION PRESENTED

Whether, in a habeas corpus petition, an amended claim alleging violation of the petitioner's Fifth Amendment right against self-incrimination relates back to an original claim alleging violation of the petitioner's rights under the Confrontation Clause, such that the new claim is not barred by the AEDPA statute of limitations.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
INTERESTS OF *AMICI CURIAE*	1
INTRODUCTION AND BACKGROUND	2
SUMMARY OF ARGUMENT	3
ARGUMENT	5
I. FELIX'S UNLAWFUL CONVICTION IS THE RELEVANT EVENT FOR PURPOSES OF "RELATION BACK"	5
A. A Trial Is "Conduct," A "Transaction," And An "Occurrence"	6
B. The Relevant Event For Purposes Of Rule 15(c)(2) Is The Injury Suffered By The Petitioner, Not The Various Causes Of That Injury	9
C. There Is No Basis In The Federal Rules To Interpret Rule 15 Differently For Purposes Of Habeas Petitions	16
II. RULE 15(a) ENSURES THAT RELATION BACK WILL NOT UNDERMINE THE AEDPA STATUTE OF LIMITATIONS	19
CONCLUSION	22

TABLE OF AUTHORITIES

CASES

	Page
Alpern v. *UtiliCorp United, Inc.*, 84 F.3d 1525 (8th Cir. 1996)	10
Anthony v. *Cambra*, 236 F.3d 568 (9th Cir. 2000)	16
Barthel v. *Stamm*, 145 F.2d 487 (5th Cir. 1944)	9, 13
Beegan v. *Brady-Hamilton Stevedore Co.*, 346 F.2d 857 (9th Cir. 1965)	11
Bensel v. *Allied Pilots Ass'n*, 387 F.3d 298 (3d Cir. 2004), *petition for cert. filed*, No. 04-1145 (U.S. Feb. 22, 2005)	10
Boddy v. *Dean*, 821 F.2d 346 (6th Cir. 1987), *abrogated on other grounds by Irwin* v. *Department of Veteran Affairs*, 498 U.S. 89 (1990)	9, 13
Bowles v. *Pure Oil Co.*, 5 F.R.D. 300 (E.D. Pa. 1946)	6
Chavez v. *Martinez*, 538 U.S. 760 (2003)	15
Chitimacha Tribe v. *Harry L. Laws Co.*, 690 F.2d 1157 (5th Cir. 1982)	21
Chromalloy Am. Corp. v. *Alloy Surfaces Co.*, 351 F. Supp. 449 (D. Del. 1972)	20
Clark v. *Martinez*, 125 S. Ct. 716 (2005)	17
Clark v. *California*, No. C96-1486-FMS, 1998 WL 242688 (N.D. Cal. May 11, 1998)	17
Cooper v. *American Employer's Ins. Co.*, 296 F.2d 303 (6th Cir. 1961)	20
Cornell & Co. v. *Occupational Safety & Health Review Comm'n*, 573 F.2d 820 (3d Cir. 1978)	20
Crawford v. *Washington*, 541 U.S. 36 (2004)	15
Demars v. *General Dynamics Corp.*, 779 F.2d 95 (1st Cir. 1985)	21
Ellzey v. *United States*, 324 F.3d 521 (7th Cir. 2003)	14, 18, 20
FDIC v. *Conner*, 20 F.3d 1376 (5th Cir. 1994)	13

TABLE OF AUTHORITIES—continued

	Page
Feldman v. *Lifton*, 64 F.R.D. 539 (S.D.N.Y. 1974)	20
Fluker v. *Kenney's Franchise Corp.*, 908 F.2d 966 (4th Cir. 1990), *available at* 1990 WL 101418	10
Foman v. *Davis*, 371 U.S. 178 (1962)	19
Harris v. *Nelson*, 394 U.S. 286 (1969)	18
Johnson v. *Educational Testing Serv.*, 754 F.2d 20 (1st Cir. 1985)	21
Kennedy v. *Josephthal & Co.*, 635 F. Supp. 399 (D. Mass. 1985), *aff'd*, 814 F.2d 798 (1st Cir. 1987)	20
Kentucky v. *Stincer*, 482 U.S. 730 (1987)	15
Klamath-Lake Pharm. Ass'n v. *Klamath Med. Serv. Bureau*, 701 F.2d 1276 (9th Cir. 1983)	21
Kokoszka v. *Belford*, 417 U.S. 642 (1974)	9
Miller v. *American Heavy Lift Shipping*, 231 F.3d 242 (6th Cir. 2000)	10, 13
Myelle v. *American Cyanamid Co.*, 57 F.3d 411 (4th Cir. 1995)	10
Rural Fire Prot. Co. v. *Hepp*, 366 F.2d 355 (9th Cir. 1966)	11, 13
Siegel v. *Converters Transp., Inc.*, 714 F.2d 213 (2d. Cir. 1983)	10
Skehan v. *Board of Trs.*, 590 F.2d 470 (3d Cir. 1978), *overruled on other grounds as stated in Smith* v. *City of Pittsburgh*, 764 F.2d 188 (3d Cir. 1985)	20
Slack v. *McDaniel*, 529 U.S. 473 (2000)	20
Smith v. *Ayres*, 845 F.2d 1360 (5th Cir. 1988)	21
Snoqualmie Tribe of Indians ex rel. Skykomish Tribe of Indians v. *United States*, 372 F.2d 951 (Ct. Cl. 1967)	11, 20
Staren v. *American Nat'l Bank & Trust Co. of Chi.*, 529 F.2d 1257 (7th Cir. 1976)	11

TABLE OF AUTHORITIES—continued

	Page
Sun Oil Co. v. *Wortman*, 486 U.S. 717 (1988)	9, 11
Tiller v. *Atlantic Coast Line R.R.*, 318 U.S. 54 (1943)	12
Tiller v. *Atlantic Coast Line R.R.*, 323 U.S. 574 (1945)	3, 4, 11, 12
Troxel Mfg. Co v. *Schwinn Bicycle Co.*, 489 F.2d 968 (6th Cir. 1973)	20
United States v. *Verdugo-Urquidez*, 494 U.S. 259 (1990)	15
Violette v. *Smith & Nephew Dyonics, Inc.*, 62 F.3d 8 (1st Cir. 1995)	10
Wood v. *Santa Barbara Chamber of Commerce, Inc.*, 705 F.2d 1515 (9th Cir. 1983)	21

CONSTITUTION AND STATUTES

U.S. Const. amend. VI	14
Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, *codified at* 28 U.S.C.A. § 2244(d)(1)(A)	2
28 U.S.C. § 2242	16
45 U.S.C. § 22 *et seq.*	12
§ 51 *et seq.*	11

RULES

Fed. R. Civ. P. 15	1, 3
Rule 11 of the Rules Governing Section 2254 Cases in the United States District Courts	3
Advisory Note, Rule 11 of the Rules Governing Section 2254 Cases in the United States District Courts	18

SCHOLARLY AUTHORITIES

3 *Moore's Federal Practice* (3d ed. 2004)	10

TABLE OF AUTHORITIES—continued

	Page
Note, *Developments in the Law: Statutes of Limitations*, 63 Harv. L. Rev. 1177 (1950)	10
Fischer, *The Limits of Statutes of Limitations*, 16 S.W. U. L. Rev. 1 (1986)	11
Fraiser, *Selected Procedural Issues in Section 1983 Litigation, in Section 1983 Civil Rights Litigation and Attorneys' Fees 1989: Current Developments* (1989)	11
Goodman, *On the Fiftieth Anniversary of the Federal Rules of Civil Procedure: What did the Drafters Intend?*, 21 Suffolk U. L. Rev. 351 (1987)	16
Wright & Kane, *The Law of Federal Courts* (6th ed. 2002)	13
6 Wright, Miller & Kane, *Federal Practice and Procedure* (2d ed. 1990)	6, 20
6A Wright, Miller & Kane, *Federal Practice and Procedure* (2d ed. 1990)	10

OTHER AUTHORITIES

Hughes, C.J., Address before the American Law Institute (May 9, 1935), *reprinted in* 21 A.B.A.J. 340 (1935)	16
Black's Law Dictionary (8th ed. 2004)	6, 7, 8
Webster's New World Dictionary (2d coll. ed. 1984)	6, 8

INTERESTS OF *AMICI CURIAE*[1]

Amici Curiae are all professors who teach in the field of civil procedure. Their qualifications are set forth in the Appendix. As scholars and commentators in the field, *amici* have a unique perspective on the traditional construction of the Federal Rules of Civil Procedure, and an interest in maintaining consistent and uniform interpretation of those Rules.

Given that perspective, *amici* believe that the issue presented here is of fundamental importance to the proper interpretation of the Federal Rules, because Rule 15(c) is a key mechanism in ensuring the just adjudication of civil actions. It permits an original complaint or petition to be amended—within the important limitations established by Rule 15(a)—so long as the amended pleading relates to the same "conduct, transaction, or occurrence" as the original pleading. Fed. R. Civ. P. 15(c)(2). In short, it helps to ensure that related issues are adjudicated in a single proceeding, and that formalistic procedural barriers do not prevent the just adjudication of substantial claims. To interpret Rule 15(c) as foreclosing Mr. Felix's amended petition would do violence to Rule 15(c) and its purposes, not only in the context of habeas corpus, but across civil procedure. After all, the rules of habeas corpus specifically incorporate the Federal Rules where they do not conflict with other habeas statutes, and the rule that the Court adopts in this case will have repercussions for all civil litigation in the federal courts.

---

[1] Pursuant to Rule 37.6 of the Rules of this Court, the parties have consented to the filing of this brief, and letters of consent have been lodged with the Clerk. Pursuant to Rule 37.6 of this Court, we state that no counsel for a party has written this brief in whole or in part, and that no person or entity, other than *amici* or their counsel,. has made a monetary contribution to the preparation or submission of this brief.

INTRODUCTION AND BACKGROUND

In 1996, Congress implemented a one-year statute of limitations for habeas corpus petitions. See Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. 104-132, § 101, 110 Stat. 1214, 1217, *codified at* 28 U.S.C.A. § 2244(d)(1)(A). The filing of the writ, however, remains subject to the relation-back doctrine of Rule 15(c)(2) of the Federal Rules of Civil Procedure. In this particular fashion (as well as many others) the Great Writ interacts and intersects with the Federal Rules of Civil Procedure—one of the triumphs of twentieth century law that has succeeded in no small part because of the offices of this Court. It is crucial that this interaction is implemented properly, in order to protect the purpose of the writ, the integrity and consistency of the Federal Rules, and the judgment of Congress.

In this case, the interpretation of the Federal Rule that most closely aligns with precedent and the purposes of the Rule also provides appropriate protection to the writ of habeas corpus. Rule 15(c)(2) permits relation back when a single injury is alleged in the original petition, and the petitioner amends the petition to identify additional causes of that same injury. Because the Federal Rules provide ample protection for statutes of limitations, this interpretation also remains faithful to congressional intent. This interpretation is also efficient. It permits courts the time and opportunity to appoint counsel in worthy cases and to have those counsel prepare appropriate amendments to prose filed petitions.

Most importantly, a contrary interpretation in habeas cases would diverge from precedent. Creating two interpretations of the same rule depending on the cause of action would place at risk not only the relation-back doctrine in all civil actions, but the uniform interpretation of the Rules in general. The Federal Rules created a unified system of procedure out of the morass of divergent systems that preceded them. The Warden now asks the Court to risk returning to that system by

affording the Rules a different interpretation depending on the cause of action at issue in a particular case. The Court should forcefully reject this unwarranted and unwise suggestion.

SUMMARY OF ARGUMENT

Mr. Felix came to federal court with a single allegation: that California has unlawfully detained him based on a trial that violated his constitutional rights. His petition is based upon one indivisible injury (unlawful detention), and one individual event underlying that injury—namely, a conviction based on unconstitutional evidence.

The Warden, however, seeks to parse Mr. Felix's injury into two separate claims, and on that basis asserts that Felix's amended claim is time-barred. This argument runs directly contrary to Federal Rule of Civil Procedure 15, its long-standing interpretation, and its salutary purposes. Rule 15 permits a plaintiff to amend a complaint or petition. Under the rules governing habeas corpus proceedings, the same procedure applies in habeas cases. See Rule 11 of the Rules Governing Section 2254 Cases in the United States District Courts. Under certain circumstances, Rule 15 creates a special rule governing the timeliness of amended pleadings. If the amended petition arises out of the same "conduct, transaction, or occurrence set forth" in the original pleading, then it is deemed to "relate[] back" to the original pleading, and therefore is timely even if the statute of limitations has run. Fed. R. Civ. P. 15(c)(2). Here, Felix's amended complaint, just like his original complaint, relates to his unconstitutional trial (and subsequent detention), which constitutes "conduct," a "transaction," *and* an "occurrence" within the meaning of Rule 15(c)(2). In short, the plain text of Rule 15(c)(2) compels the conclusion that Felix's amended complaint relates back to the original. It is, therefore, timely.

This reading of Rule 15(c)(2) is confirmed and compelled by *Tiller* v. *Atlantic Coast Line Railroad*, 323 U.S. 574

(1945), which holds that relation back is permitted when the original complaint alleges an injury and the amended filing simply alleges additional causes of that same injury. *Id.* at 580-81. That is precisely what occurred here. Felix's original petition alleged one cause of his unconstitutional detention (namely, violation of his Sixth Amendment right to confront witnesses); his amended petition simply alleges that the same injury is also attributable to a second cause (i.e., violation of his Fifth Amendment right against self-incrimination). Under such circumstances, *Tiller* plainly requires relation back.

Any other result would cause one of two intolerable consequences. On the one hand, interpreting Rule 15(c) in the fashion advocated by the Warden would require an atextual reading of the Rule that would conflict with the Rule's longstanding interpretation. Such an approach is obviously unjustified, which the Warden tacitly admits when she advocates interpreting Rule 15 differently in the context of habeas petitions. This result, too, is intolerable, as there is absolutely no justification for crafting a habeas exception to Rule 15. The Rules must be consistent, regardless of the cause of action at issue in a given case, or there exists a grave danger of conflicting rulings and unfairness to all litigants, not just habeas petitioners.

The current interpretation of Rule 15(c)(2) has survived for over six decades. It has been interpreted consistently in all civil cases, despite claims that unique circumstances merit particular expediency for certain causes of action. The courts have doggedly resisted suggestions that the Rule cannot apply uniformly. Judges have wisely ignored doomsday predictions concerning the terrible consequences of relation back in given cases. This case presents merely one more such prediction that should be answered in the same way courts have answered others of its kind: Rule 15(c)(2) is one rule, with one meaning. The risk of inconsistent interpretation of the

Federal Rules dwarfs any risk posed by relation back in habeas petitions.

Indeed, there is no reason to distort Rule 15(c) to accomplish the end the Warden seeks, because courts already have ample means to resolve the practical concerns she raises (such as lengthy delays caused by frequent amendments). In order to amend a petition after an answer or other responsive pleading has been filed, a claimant must first obtain leave of court or the consent of the adverse party. And under Rule 15(a), the district court may withhold leave to amend in a number of circumstances, including when the proposed amendment would be frivolous or would prejudice the opposing party by imposing drastic alteration of the issues for trial. Simply put, there is no reason to distort Rule 15(c)'s plain text, its longstanding interpretation and its valuable purpose—and there is every reason not to take this radical step. The judgment below should be affirmed.

ARGUMENT

I. FELIX'S UNLAWFUL CONVICTION IS THE RELEVANT EVENT FOR PURPOSES OF "RELATION BACK."

For purposes of Rule 15(c)(2), the "conduct, transaction, or occurrence" at issue in Felix's habeas corpus petition is his allegedly unlawful conviction. A plain reading of the Rule necessitates this conclusion, as the trial at issue easily satisfies *all three* of Rule 15(c)(2)'s disjunctive criteria. Case law interpreting Rule 15(c)(2) confirms this plain reading. The injury alleged by a complainant is itself the relevant "conduct, transaction, or occurrence," regardless of whether the injury has multiple causes. Here, the injury is Mr. Felix's unlawful detention as a result of an unconstitutional trial. Felix's original and amended petitions both concern this single injury. Accordingly, the amended petition relates back to the original petition, and it is timely.

A. A Trial Is "Conduct," A "Transaction," And An "Occurrence."

Rule 15 is an integral part of the shift to liberalized pleading standards that characterized the adoption of the Federal Rules. See 6 Wright, Miller & Kane, *Federal Practice and Procedure* § 1471, at 505-07 (2d ed. 1990) ("[T]he Rule's purpose is to provide maximum opportunity for each claim to be decided on its merits rather than on procedural technicalities. . . . No longer is a party to be irrevocably bound to the legal or factual theory of his first pleading."). To that end, it has long been recognized that Rule 15(c)(2) liberalized the relation back doctrine, consistent with the general goal of the Federal Rules that disputes should be settled on their merits. *Id.* at 505 (the "effect of [Rule 15] is an amendment policy that is more liberal than that permitted at common law or under the codes"); *e.g.*, *Bowles* v. *Pure Oil Co.*, 5 F.R.D. 300, 303 (E.D. Pa. 1946) (although "[t]he doctrine of relation back of amendments existed long before the adoption of the Rules of Civil Procedure, . . . Rule 15(c) broadened its application").

This broad purpose is reflected in the sweeping, all-inclusive language of Rule 15(c)(2). There are any number of terms that the drafters of Rule 15 could have used to describe when a pleading relates back, but they chose three extremely broad ones: "conduct," "transaction," and "occurrence." Each of those terms plainly and easily encompasses the claim that the relevant event, for present purposes, is the trial that led to Mr. Felix's conviction.

The term "conduct" is broadly defined to include "[p]ersonal behavior, whether by action or inaction; the manner in which a person behaves." *Black's Law Dictionary* 315 (8th ed. 2004). Non-legal dictionaries confirm this broad understanding—the term is defined to encompass "the way one acts; behavior; deportment." *Webster's New World Dictionary* 296 (2d coll. ed. 1984). That Felix's trial falls within the expansive reaches of the term conduct hardly

requires discussion. In habeas matters, the broad "conduct" of the trial judge in ruling upon motions or objections and in "conducting" the trial gives rise to the unconstitutional trial that forms the basis of the petition. Mr. Felix contends that the trial judge "conducted" the trial in an unconstitutional fashion, when the court erroneously and improperly admitted evidence in violation of the Confrontation Clause and the Fifth Amendment right against self-incrimination.

Even more obviously, the challenged trial constitutes a "transaction." That term has multiple definitions, more than one of which applies here. For instance, it means "[s]omething performed or carried out." *Black's Law Dictionary* at 1535. In terms that are yet more capacious, a transaction encompasses "[a]ny activity involving two or more persons." *Id.* The trial and resulting detention unquestionably were "carried out" (prison sentences, as another example, are often said to be "carried out") and there can be no question that the trial and resulting detention are "activities involving two or more persons."

In an apparent effort to seek out a limited and favorable definition of the term "transaction," *Amici* States Attorneys General cite an outdated version of *Black's Law Dictionary*, and claim that a "transaction" is only an "'[a]ct of transacting or conducting any business.'" *Amici* States AG Br. at 10 (quoting *Black's Law Dictionary* 1496 (6th ed. 1990)). To be sure, in certain contexts the term transaction has a financial component. But that is by no means the only definition of the term, as *Black's* confirms. Indeed, the fragmentary definition provided by *Amici* has been amended to include "business *or other dealings*." *Black's Law Dictionary* 1535 (8th ed. 2004) (emphasis added). More importantly, this is by no means the only definition of the term, as both the sixth and eighth editions of *Black's* recognize. In fact, the sixth edition defines the term in a fashion that is even broader than the current edition, and therefore even more favorable to Felix here: "that which is done; an affair. An act, agreement, or

several acts or agreements between or among parties whereby a cause of action or alteration of legal rights occur. . . ." That definition unquestionably encompasses the unconstitutional trial and detention that Felix alleged to have occurred.

The final term in Rule 15(c)(2)'s definitional triad is "occurrence." This is the broadest of the three terms, as evidenced by its definition: "[s]omething that happens or takes place." *Black's Law Dictionary* at 1109. This legal definition is mirrored precisely by non-specialized definitions that recognize the breadth of the term. Another authority notes, for instance, that "occurrence is the general word for anything that happens or takes place." *Webster's New World Dictionary* at 984 (emphasis omitted). Under this common sense definition, no reasonable argument can be made that a trial is not an "occurrence."

It is no answer to contend, as do the States Attorneys General, that the term "occurrence" must be given a narrow interpretation to avoid rendering the other words in the phrase superfluous. *Amici* States AG Br. at 10-11. That interpretive rule, valid in other contexts, simply cannot govern here, for there is no way to define "occurrence" that is consistent with the term's plain meaning and does not encompass the terms "conduct" and "transaction." Tellingly, the States Attorneys General offer no such definition to this Court. From the face of the Rule, it is plain that the terms "conduct," "transaction" and "occurrence" were meant to be overlapping and broadly encompassing. To suggest without explanation that "occurrence" must be given a forced construction to suit the desired result is the crudest form of question-begging, and does great violence to the plain language and purpose of the Rule.

B. The Relevant Event For Purposes Of Rule 15(c)(2) Is The Injury Suffered By The Petitioner, Not The Various Causes Of That Injury.

1. This plain-language interpretation of Rule 15 is confirmed by the longstanding interpretation of that rule's purpose, as recognized by this Court, as well as by lower courts and by commentators.

> When "interpreting a statute, the court will not look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute . . . and the objects and policy of the law, as indicated by its various provisions, and give to it such a construction as will carry into execution the will of the legislature . . . ."

Kokoszka v. *Belford*, 417 U.S. 642, 650 (1974) (second omission in original). As noted above, the purpose of the Federal Rules is to do substantial justice, and to promote resolution of disputes on their merits whenever possible. See *supra* at I.A. The drafters sought to ensure that cases be decided on their merits rather than on pleading technicalities. In service of this goal, Rule 15(c)(2) permits a claimant who has filed a timely complaint to add claims that would otherwise be time-barred so long as his original claim put the opposing party on notice of the injury that is alleged. The Rules permit such relation back because under such circumstances the purposes of the statute of limitations—i.e., preservation of evidence, *Barthel* v. *Stamm*, 145 F.2d 487, 491 (5th Cir. 1944), preventing stale claims and providing repose, *Sun Oil Co.* v. *Wortman*, 486 U.S. 717, 736 (1988) (Brennan, J., concurring in part, and concurring in the judgment)—have been satisfied by the original filing. The original filing puts the opposing party on notice that it should preserve evidence relating to the injury, and thus the opposing party "has been afforded all the notice the statutes of limitations are designed to afford." *Boddy* v. *Dean*, 821 F.2d 346, 352 (6th Cir. 1987) (Joiner, J., concurring in part, and

dissenting in part), *abrogated on other grounds by Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89 (1990).

Consistent with this guiding principle, courts have uniformly recognized that Rule 15 is to be broadly construed, so as to remain faithful to the original intent of the Rule. Contrary to the argument advanced by the Warden and her *amici*, Rule 15(c) has in no way been given a narrow interpretation. *Amici* States AG Br. at 15 (referring to Rule 15(c)(2)'s "generally-recognized narrow scope"). A liberal interpretation of Rule 15(c) echoes loudly and frequently through the cases and commentary. See, *e.g.*, 3 *Moore's Federal Practice* § 15.02[1], at 15-10 (3d ed. 2004) ("Rule 15 further enhances the policy of allowing liberal amendments by allowing the relation back of amendments under certain circumstances . . . ."); 6A Wright, Miller & Kane, *Federal Practice and Procedure* § 1497, at 93 (2d ed. 1990) (referring to the "liberal policy of Rule 15(c)"); Note, *Developments in the Law: Statutes of Limitations*, 63 Harv. L. Rev. 1177, 1265 (1950) (referring to the "liberal standards for amendment of a pleading[] after expiration of the statutory period" of Rule 15(c)).[2]

---

[2] This commentary is supported by the case law. Courts uniformly have recognized that the rule is meant to be construed broadly in light of the Federal Rules' purposes. *See, e.g.*, *Bensel* v. *Allied Pilots Ass'n*, 387 F.2d 298, 310 (3d Cir. 2004) (interpretation of Rule 15(c) should be "[i]n accordance with the general theory of liberalized pleading in the federal system"), *petition for cert. filed*, No. 04-1145 (U.S. Feb. 22, 2005); *Miller* v. *American Heavy Lift Shipping*, 231 F.3d 242, 249 n.6 (6th Cir. 2000) (referring to the "liberal approach of Rule 15(c)"); *Alpern* v. *UtiliCorp United, Inc.*, 84 F.3d 1525, 1543 (8th Cir. 1996) (Rule 15(c) "has been liberally construed"); *Myelle* v. *American Cyanamid Co.*, 57 F.3d 411, 416 (4th Cir. 1995) (calling interpretation of Rule 15(c) "flexible" and "liberal"); *Violette* v. *Smith & Nephew Dyonics, Inc.*, 62 F.3d 8, 12 n.2 (1st Cir. 1995) (referring to the "liberal standard for amendments to pleadings of Fed. R. Civ. P. 15(c)"); *Fluker* v. *Kenney's Franchise Corp.*, 908 F.2d 966 (4th Cir. 1990) (per curiam) (table), *available at* 1990 WL 101418, at **2 ("liberality should guide our analysis under Rule 15(c)"); *Siegel* v. *Converters Transp., Inc.*, 714 F.2d 213, 216 (2d. Cir. 1983) (per curiam) ("We held over forty years ago that Rule 15(c) was to be liberally construed . . . ."); *Staren* v. *American Nat'l Bank & Trust Co. of Chi.*, 529 F.2d 1257, 1263 (7th Cir. 1976) ("amendments pursuant to Rule 15(c) should be freely allowed"); *Snoqualmie Tribe of Indians ex rel. Skykomish Tribe of Indians* v. *United States*, 372 F.2d 951, 960 n.5 (Ct. Cl. 1967) ("Federal courts have applied Rule 15(c) very liberally."); *Rural Fire Prot. Co.* v. *Hepp*, 366 F.2d 355, 362 (9th Cir. 1966) (Rule 15(c) is "liberally applied"); *Beegan* v. *Brady-Hamilton Stevedore Co.*, 346 F.2d 857, 860 (9th Cir. 1965) (referring to the "liberality . . . which is enjoined upon the courts by Rule 15(c)"); Fraser, *Selected Procedural Issues in Section 1983 Litigation, in Section 1983 Civil Rights Litigation and Attorneys' Fees 1989: Current Developments* 115, 125 (1989) (Rule 15(c) "has been construed very liberally"); Fischer, *The Limits of Statutes of Limitations*, 16 S.W. U. L. Rev. 1, 22 (1986) ("federal courts liberally allow relation back for new claims asserted against existing defendants") (footnote omitted).

2. Rule 15's broad purpose is confirmed, and its application in this context made quite clear, by *Tiller* v. *Atlantic Coast Line Railroad*, 323 U.S. 574 (1945). In that case, the Court recognized that when multiple acts by the same party cause a single injury, the claimant must plead only the injury to place the offending party on notice that all events leading to the injury will be at issue. Once the offending party has such notice, the purposes of the statute of limitations are satisfied. The possibility of repose has been eliminated, and the opposing party has been notified that it should preserve all evidence relating to the injury alleged, thus avoiding the potential for stale claims. *Sun Oil Co.*, 486 U.S. at 736.

Tiller concerned a railroad employee who was killed by a backward-moving train. The family of the deceased brought suit against the railroad under the Federal Employer's Liability Act, 45 U.S.C. § 51 *et seq.*, in which they alleged common-law negligence on the part of the railroad. The specific acts of negligence included failure to provide a lookout, failure to give the deceased proper warning of the approach of a train, and failure to provide adequate lighting on the lead car of the backward-moving train. The family

later sought to amend its complaint to add the additional claim that the railroad had violated the Boiler Inspection Act, 45 U.S.C. § 22 *et seq.*, which required that all locomotives have one light on the front and one light on the rear, despite the fact that the statute of limitations had run.

Critical here is the factually distinct nature of the original and amended claims. The original claim alleged a negligent failure to properly light the *front* car in the train's backward motion. *Tiller* v. *Atlantic Coast Line R.R.* 318 U.S. 54, 56 (1943); *Tiller*, 323 U.S. at 578, 581. The amended claim alleged failure to provide a light on the rear of the locomotive, i.e., the *rear* car on the backward-moving train. 323 U.S. at 577. The amendment involved completely different evidence, and a different duty on the part of the railroad.

Even so, the Court held that the amendment related back to the original claim. It concluded that the relevant event for purposes of Rule 15(c)(2) was not the individual acts of negligence that made the death possible, but rather the more general "conduct, transaction, or occurrence which involved the death of the deceased." *Id.* at 581. The Court was careful to point out that the purposes of a statute of limitations are satisfied by the filing of a petition relating to a single injury, regardless of whether the various factual predicates to the injury are all included in the petition.[3]

The interpretation and application of *Tiller* in the federal courts of appeals confirms that, under Rule 15, Felix's amended petition relates back. "'[A]n amendment that

[3] *See Tiller*, 323 U.S. at 581:

> The cause of action now, as it was in the beginning, is the same—it is a suit to recover damages for the alleged wrongful death of the deceased. . . . There is no reason to apply a statute of limitations when, as here, the respondent has had notice from the beginning that petitioner was trying to enforce a claim against it because of the events leading up to the death of the deceased in the respondent's yard.

alleges added events leading up to the same injury may relate back.'" *Miller* v. *American Heavy Lift Shipping*, 231 F.3d 242, 248 (6th Cir. 2000) (quoting *Koon* v. *Lakeshore Contractors*, 128 F.R.D 650, 653 (W.D. Mich. 1988)). The reason for this is plain: "When a suit is filed in a federal court under the Rules, the defendant knows that the whole transaction described in it will be fully sifted, by amendment if need be. . . ." *Barthel*, 145 F.2d at 491. And, important here, an amended pleading relates back even when the alleged causes of a single injury occur at different times. *FDIC* v. *Conner*, 20 F.3d 1376, 1386 (5th Cir. 1994) (in a mismanagement case, the court permitted loans not included in the original complaint to relate back because they caused the same injury); *Boddy*, 821 F.2d at 351 (separate instances of sexual harassment related back, as they were part of the same course of conduct); *Rural Fire Prot. Co.* v. *Hepp*, 366 F.2d 355 (9th Cir. 1966) (additional periods of unpaid wages related back to periods pleaded in the original claim). Commentators confirm the lower courts' interpretation of *Tiller*. Wright & Kane, *The Law of Federal Courts* § 66, at 462 (6th ed. 2002) (the *Tiller* court permitted relation back even though the amendment "was based on a different legal theory than was the original [claim], and it rested on facts not asserted originally").

Tiller flatly forecloses the argument that the appropriate inquiry is not the injury itself, but rather the factual predicate to the injury. But cf. *Amici* States AG Br. at 2 (advancing this argument). This theory, were it correct, would have required the opposite result in *Tiller*. The injury in that case was the employee's death, and it was alleged to result from multiple, independent, and factually distinct predicate causes, some of which were not identified in the original complaint. The original complaint, for instance, did not mention the failure to light the back end of the locomotive; this was added only in the amended complaint. Nonetheless, the Court permitted relation back precisely because it recognized that the proper

focus for purposes of Rule 15 is the injury, not the factual predicates to it.

Like the claimant in *Tiller*, Felix has consistently alleged a single injury: wrongful detention based on an unlawful conviction. As in *Tiller*, there are several acts that led to that single injury. By alleging one of the failures that led to his injury, Mr. Felix put the state on notice that he would be challenging his trial and conviction. Just as in *Tiller*, any basis for challenging that conviction relates back to the original claim. The state has been afforded all the protection that a statute of limitations is designed to afford. As the Seventh Circuit properly recognized: "A prisoner who comes up with ten different ways to contest his sentence still is litigating about a single transaction or occurrence (the supposedly unlawful sentence), so an amendment necessarily relates back under Rule 15(c)(2)." *Ellzey* v. *United States*, 324 F.3d 521, 526 (7th Cir. 2003).

3. That Felix's amended filing relates back to his original petition is confirmed by the fact that the constitutional errors at issue in Felix's petitions both are *trial* errors. Accordingly, there can be no question that his trial is the relevant event for purposes of Rule 15. Mr. Felix has alleged two constitutional violations: that his rights under the Sixth Amendment's Confrontation Clause were violated when videotaped testimony was admitted against him; and that his Fifth Amendment right to due process and against self-incrimination were violated by the admission of evidence concerning statements that Felix made as the result of coercion and intimidation. Because constitutional errors occurred only once the evidence was wrongfully introduced at trial, Felix's injury for purposes of *Tiller* analysis must be his trial—which, for all of the reasons set forth above and in Felix's own brief, is undoubtedly "conduct, [a] transaction, or [an] occurrence."

Felix's first claim, that his Confrontation Clause rights were violated, self-evidently concerns a trial right. See U.S.

Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ."). It is the admission *at trial* of unconfronted testimony that violates the Constitution. See generally *Crawford* v. *Washington*, 541 U.S. 36 (2004); see also *Kentucky* v. *Stincer*, 482 U.S. 730, 737 (1987) ("The right to cross-examination, protected by the Confrontation Clause, thus is essentially a 'functional' right designed to promote reliability in the truth-finding functions of a criminal trial.").

Likewise, the right against self-incrimination is a trial right, as this Court recently has held. "Statements compelled by police interrogations of course may not be used against a defendant at trial, but it is not until their use in a criminal case that a violation of the Self-Incrimination Clause occurs . . . ." *Chavez* v. *Martinez*, 538 U.S. 760, 767 (2003) (plurality opinion) (citations omitted); see also *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 264 (1990) ("The privilege against self-incrimination guaranteed by the Fifth Amendment is a fundamental trial right of criminal defendants. Although conduct by law enforcement officials prior to trial may ultimately impair that right, a constitutional violation occurs only at trial.") (citation omitted).[4]

This close nexus between the errors alleged in the original and amended petitions confirms that they arise out of a single instance of "conduct, transaction, or occurrence."

---

[4] To be sure, the Court has left open the possibility that the Fifth Amendment right against self-incrimination may extend beyond a formal trial. *See Chavez*, 538 U.S. at 766-67 (leaving unresolved the question when a "criminal case" commences for purposes of the Fifth Amendment). But it remains clear that it is the fact of admitting coerced testimony, and thereby compelling a defendant to "be a witness against himself" that causes the constitutional violation. *Id.*

C. There Is No Basis In The Federal Rules To Interpret Rule 15 Differently For Purposes Of Habeas Petitions.

Rule 15 applies to habeas cases. 28 U.S.C. § 2242; *Anthony v. Cambra*, 236 F.3d 568, 576 (9th Cir. 2000). Despite protestations to the contrary, petitioner asks this Court to interpret Rule 15(c) differently in the habeas context than it does in the civil context. This is unfaithful to the spirit of the Rules and the explicit goals of the drafters.

In an address to the American Law Institute, Chief Justice Hughes described the purpose of the Federal Rules: "It is manifest that the goal we seek is a simplified practice which will strip procedure of unnecessary forms, technicalities and distinctions, and permit the advance of causes to the decision of their merits with a minimum of procedural encumbrances." Hughes, C.J., Address before the American Law Institute (May 9, 1935), *reprinted in* 21 *A.B.A.J.* 340, 341 (1935); see also Goodman, *On the Fiftieth Anniversary of the Federal Rules of Civil Procedure: What did the Drafters Intend?*, 21 Suffolk U. L. Rev. 351, 356-57 (1987) ("[t]he dominant intellectual and operational force" on the Advisory Committee for the Federal Rules "believed that procedure should be entirely separate from substance").

If the Court adopted appellant's logic, there would be two interpretations of Rule 15(c)(2). In civil trials, the rule would remain that all causes of the same injury relate back. In the habeas context, two causes of the same injury would not be recognized as facets of the same "conduct, transaction, or occurrence." There would in essence be two separate legal standards under the same language.

Creating such a precedent places at risk not only Rule 15(c)(2), but the very theory upon which the Federal Rules are based. Uniform interpretation creates efficiency. It relieves claimants of the burden of assiduously obeying multiple arcane procedural requirements. If Rule 15(c)(2)

creates different standards depending on the cause of action, there is nothing to stop courts from creating specialized interpretations of other procedural rules. This result offends the founding rationale of the Federal Rules.

Putting to one side the obvious difficulty inherent in interpreting the plain language of Rule 15 in two contradictory ways, see *Clark* v. *Martinez*, 125 S. Ct. 716, 722-23 (2005) (to give two different meanings to the same statutory language "would be to invent a statute rather than interpret one"), such a result could not reasonably be cabined to the habeas context. There are other, comparably unique areas of law in which the values of speedy resolution, finality and repose are of similar, if not greater value. These include challenges to administrative actions, civil rights proceedings and many forms of class action involving prisoners and others with claims against States or other holders of the public fisk. *E.g.*, *Clark* v. *California*, No. C96-1486-FMS, 1998 WL 242688 (N.D. Cal. May 11, 1998) (Rule 15(c)(2) applied in prisoners' class action). In these contexts, as in all civil actions, Rule 15 amendments are commonplace. To adopt a special reading of Rule 15(c) in the habeas context is to open the door to new variations on Rule 15(c) in other areas of the law, and such a context-specific reading of the rule can only lead to further disuniformity from jurisdiction to jurisdiction. The result will be unfairness to litigants, and confusion and complexity that parallel the regime that preceded the adoption of the Rules.[5]

It is unsurprising, then, that the Advisory Committee, this Court, and Congress did not intend for divergent interpretations of Rule 15(c)(2) in the habeas context. Rule

---

[5] The foreseeable consequence of permitting different interpretations of Rule 15 is that uncertain litigants will be compelled to "throw in the kitchen sink" in their initial pleading or in an amendment immediately before the expiration of the statute of limitations. Creating such an impetus does little for the cause of efficiency, especially for those, like the *amici* States, who must respond to such pleadings.

11 of the Rules Governing Section 2254 Cases in the United States District Courts states: "The Federal Rules of Civil Procedure, to the extent that they are not inconsistent with these rules, may be applied, when appropriate, to petitions filed under these rules."

To be sure, this is not a bright-line rule that every one of the Federal Rules of Civil Procedure invariably applies unless it directly conflicts with the habeas rules. Congress recognized that, in some cases, the Court must exercise its discretionary authority to diverge from the Rules. See Advisory Committee Notes to Rule 11 (citing with approval *Harris* v. *Nelson*, 394 U.S. 286 (1969)). This does not mean, however, that courts have a free hand to reinterpret for habeas purposes a rule that is clearly applicable to habeas. Rather, it means only that certain rules simply do not apply to habeas. *E.g.*, *Harris*, 394 U.S. at 297 (concluding that Rule 33 does not apply to habeas petitions). As Judge Easterbrook recognized, Congress would not have adopted the Federal Rules in the habeas context had it intended for unique applications and interpretations. *Ellzey*, 324 F.3d at 526 (decisions that do not permit relation back of additional claims in the habeas context "do not explain why Rule 15(c)(2) has one meaning for most civil litigation, and a different meaning for a collateral attack").[6] And not even the Warden asks this Court to hold Rule 15(c) altogether inapplicable in habeas; she implicitly and correctly concedes that Rule 15(c) must and does apply. Given that recognition, Rule 15(c) must apply in habeas as it does in civil litigation generally.

---

[6] Nor is there any indication that Congress intended Rule 15(c) to apply differently in the context of habeas. Congress was surely well aware of both Rule 15(c)(2) and *Tiller* when it determined that the Federal Rules should apply in the habeas context. There is nothing in Congress' enactment of the AEDPA statute of limitations to signal that the Federal Rules of Civil Procedure should operate in some different fashion when habeas is at issue.

II. RULE 15(a) ENSURES THAT RELATION BACK WILL NOT UNDERMINE THE AEDPA STATUTE OF LIMITATIONS.

To permit relation back under the circumstances presented here is not only appropriate under the consistent interpretation of Rule 15, it would in no way undermine the purposes of AEDPA's statute of limitations.

Rule 15 contains safeguards that protect the integrity of statutes of limitations, so that litigants cannot abuse the relation-back doctrine. In particular, once a responsive pleading has been served, Rule 15(a) provides that a complaint (or, as here, a petition) may not be amended without leave of court or written consent of the adverse party. And, pursuant to Rule 15(a), there are significant restraints on a party's ability to amend pleadings. To be sure, Rule 15(a) is interpreted liberally, like the other provisions of Rule 15, but courts have significant discretion to deny leave to amend. This discretion is certainly ample to foreclose abusive and repetitive pleadings and, unlike the result that the Warden urges here, the use of a court's existing power under Rule 15(a) does no violence to the longstanding and proper interpretation of Rule 15(c).

The Court confronted the question of leave to amend in *Foman* v. *Davis*, 371 U.S. 178 (1962). In so doing, it noted numerous bases upon which leave to file an amended pleading may be denied, including, "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc." *Id.* at 182. If the district court finds that a party has engaged in any of these behaviors, it is free to deny leave to amend, and the issue of relation back does not even arise. Accordingly, the discretion to deny leave enables courts to protect the integrity of all statutes of limitations. There is no indication that these tools cannot be employed to the same end to protect the AEDPA

statute of limitations. See *Slack* v. *McDaniel*, 529 U.S. 473, 489 (2000) (the Rules "vest the federal courts with due flexibility to prevent vexatious litigation" in the habeas context); *Ellzey*, 324 F.3d at 526 (concern for the purposes of the AEDPA statute of limitations "should influence the exercise of discretion under Rule 15(a)" rather than interpretation of Rule 15(c)); *Snoqualmie Tribe of Indians ex rel. Skykomish Tribe of Indians* v. *United States*, 372 F.2d 951, 960 (Ct. Cl. 1967).

In practice, district courts have not hesitated to deny leave to amend when necessary and appropriate. Most commonly, leave to amend has been denied where prejudice to the opposing party would result.[7] 6 Wright, Miller & Kane, *supra* § 1487, at 613. For example, courts have denied leave based on prejudice when a party seeks to make significant changes in legal theory so close to trial that the opposing party would be forced to alter its legal strategy. See, *e.g.*, *Cornell & Co.* v. *Occupational Safety & Health Review Comm'n*, 573 F.2d 820 (3d Cir. 1978); *Troxel Mfg. Co.* v. *Schwinn Bicycle Co.*, 489 F.2d 968 (6th Cir. 1973); *Kennedy* v. *Josephthal & Co.*, 635 F. Supp. 399 (D. Mass. 1985), *aff'd*, 814 F.2d 798 (1st. Cir. 1987); *Chromalloy Am. Corp.* v. *Alloy Surfaces Co.*, 351 F. Supp. 449 (D. Del. 1972). Accordingly, there is no cause for concern that habeas petitioners will engage in last minute amendments, much less

[7] In certain cases, courts have even denied leave to amend based on prejudice to non-parties. For example, in a dispute to determine insurance liability, the district court denied an insurance company leave to amend because granting leave would have unfairly delayed insurance payments to an injured family that was not a party to the suit. *Cooper* v. *American Employer's Ins. Co.*, 296 F.2d 303 (6th Cir. 1961); *see also Skehan* v. *Board of Trs*, 590 F.2d 470 (3d Cir. 1978), *overruled on other grounds as stated in Smith* v. *City of Pittsburgh*, 764 F.2d 188 (3d Cir. 1985); *Feldman* v. *Lifton*, 64 F.R.D. 539 (S.D.N.Y. 1974); 6 Wright, Miller & Kane, *supra* § 1487, at 634-35. Under the logic of *Cooper*, a district court could deny leave to amend based on the unjust burdens it would impose on victims.

amendments during or after trial. District court judges have the tools and the will to deny motions to amend under such circumstances.

Furthermore, courts repeatedly deny leave to amend when the amendment would add futile or frivolous claims. See, *e.g.*, *Demars* v. *General Dynamics Corp.*, 779 F.2d 95, 99 (1st Cir. 1985) ("a court has the discretion to deny [leave to amend] if it believes that, as a matter of law, amendment would be futile"); *Klamath-Lake Pharm. Ass'n* v. *Klamath Med. Serv. Bureau*, 701 F.2d 1276, 1293 (9th Cir. 1983) (denial of leave to amend was proper where the district court believed amendment "could not affect the outcome of this lawsuit"). The Federal Rules, without unique interpretations for habeas petitions, are equipped to protect the AEDPA statute of limitations—just like all other statutes of limitations—from frivolous amendments.

Indeed, leave to amend has been denied for numerous other reasons. It has been denied because of pleading failures on the part of a claimant. It has been denied when a court has offered a claimant multiple opportunities to amend and the claimant fails to effectively state a claim. See, *e.g.*, *Smith* v. *Ayres*, 845 F.2d 1360 (5th Cir. 1988). Similarly, bad faith and futility, even without prejudice to the opposing party, are sufficient reason to deny leave to amend. *Wood* v. *Santa Barbara Chamber of Commerce, Inc.*, 705 F.2d 1515, 1520 (9th Cir. 1983) (denying leave to amend because "repetitious motions to amend are a favorite tactic of" the movant). Likewise, unexplained delay has also served as a basis for denying of leave to amend. *Johnson* v. *Educational Testing Serv.*, 754 F.2d 20, 27 (1st Cir. 1985); *Chitimacha Tribe* v. *Harry L. Laws Co.*, 690 F.2d 1157, 1163 (5th Cir. 1982) ("When there has been an apparent lack of diligence, the burden shifts to the movant to prove that the delay was due to excusable neglect."). There should be no concern that habeas petitioners will engage in dilatory or manipulative tactics to defeat the AEDPA statute of limitations.

In short, Rule 15(a) provides courts with ample resources to protect the integrity of a statute of limitations in a civil suit, and there is no reason to believe that courts will be unable to employ those same resources in the habeas context. Having offered no reason why leave to amend should have been denied here under Rule 15(a), the Warden argues for a unique and inaccurate interpretation of Rule 15(c). This Court should reject that request.

CONCLUSION

For the foregoing reasons, and those set forth in Respondent's brief, the Court should affirm.

Respectfully submitted,

CARTER G. PHILLIPS*
JEFFREY T. GREEN
ERIC A. SHUMSKY
BRIAN M. PALMER
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Counsel for Amici Curiae

May 22, 2005

* Counsel of Record

APPENDIX

Arthur R. Miller is the Bruce Bromley Professor of Law at Harvard Law School, where he has taught since 1971. Professor Miller has published leading works on the subject of civil procedure. He is a co-author of *Federal Practice and Procedure*, a leading multi-volume treatise on the subject, and *Civil Procedure: Cases and Materials* (8th ed. 2001). He has published widely on civil procedure in scholarly law journals. Professor Miller received his LL.B. from Harvard Law School and his B.A. from the University of Rochester.

John B. Oakley is a Professor of Law at the University of California, Davis, School of Law. He received his J.D. from Yale Law School and his B.A. from the University of California, Berkeley. Professor Oakley has published many works on civil procedure, including *Federal Courts: Cases and Materials* (10th ed. 1999) and *Civil Procedure* (3d ed. 2001). From 1995 to 2004 he served as Reporter for the American Law Institute's Federal Judicial Code Revision Project.

Kevin M. Clermont is the Flanagan Professor of Law at Cornell Law School, where he has taught since 1974. He has also served as a visiting professor at Harvard Law School. He received his J.D. from Harvard and his A.B. from Princeton University. He is the author of numerous articles on civil procedure, as well as multiple books, including *Principles of Civil Procedure* (2005) and *Civil Procedure* (West's Black Letter Series).

Sheri J. Engelken is an Assistant Professor at Gonzaga University School of Law. She teaches civil procedure, and was a federal court litigator for nineteen years before going into academia. She has delivered speeches and presentations on numerous federal practice issues. She received her J.D. from the University of Chicago Law School, and her B.A. from the University of Missouri-Kansas City.

Tyler T. Ochoa is a Professor at Santa Clara University School of Law. He has published frequently in scholarly law journals, including several works specifically related to civil procedure and statutes of limitations. He received his J.D. from Stanford Law School and his A.B. from Stanford University.

Lauren Robel is the Dean and the Van Nolan Professor of Law at Indiana University School of Law, where her teaching focuses on both civil procedure and the federal courts. Dean Robel has published several books and other scholarly works concerning civil litigation. She has served for over ten years as a member of the Rules Committee of the Indiana Supreme Court, and as a member of the Rules Committee for the United States District Court for the Southern District of Indiana. She has also served as a member of the Advisory Committee on Circuit Rules for the United States Court of Appeals for the Seventh Circuit. Dean Robel received her J.D. from Indiana University and her B.A. from Auburn University.

Michael E. Solimine is the Donald P. Klekamp Professor of Law at the University of Cincinnati College of Law, where he has taught since 1986. Professor Solimine has published numerous books and articles on the subject of civil procedure. In addition, he served as counsel for the Civil Rules Subcommittee of the Rules Advisory Committee for the Ohio Supreme Court from 1991 to 1997. He received his J.D. from Northwestern University and his B.A. from Wright State University.

Jeffrey Stempel is the William S. Boyd Professor of Law at the University of Nevada, Las Vegas Law School, where he teaches civil procedure. He has also taught at Brooklyn Law School and the Florida State University College of Law. He received his J.D. from Yale Law School.

Georgene M. Vairo is a Professor of Law at Loyola Law School in Los Angeles, where she has taught since 1995. She

has published frequently on the subject of civil procedure, including numerous articles on the Federal Rules. She is the author of several chapters of *Moore's Federal Practice*, and serves on the Board of Editors of that publication. From 1987 to 2000 she served as Chairperson of the Dalkon Shield Claimants Trust, and is a member of the American Law Institute. She received her J.D. from Fordham Law School and her B.A. from Sweet Briar College.